

AMERICAN STATE TRIALS

A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to the Present Day.

WITH NOTES AND ANNOTATIONS

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VOLUME VII

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By JOHN D. LAWSON

TO
THE HONORABLE
JAMES HENRY WEBB

ADVOCATE, TEACHER, JURIST; ONE OF THE
JUDGES OF THE SUPERIOR COURT OF THE
STATE OF CONNECTICUT AND MY COMPAN-
ION FOR MANY A YEAR AT GATHERINGS
OF THE BENCH AND BAR AT HOME AND
ABROAD, I FONDLY DEDICATE THIS VOLUME.

PREFACE TO VOLUME SEVEN

The trial of the *Thayers* (p. 1) offers an interesting study to the criminologist. It would be hard to find a case in the history of courts of justice parallel to this—three young men of the yeoman class and all of one family brought to an ignominious death for a crime committed to gratify a love of idleness and a lust for money.

Extraordinary as it may look today, yet it is a judicially established fact that a little over ten years before the black man was given all the rights of a citizen everywhere in the land, a Southern woman, herself a slaveholder, was, in one of the chief cities of Virginia, fined and imprisoned for teaching the children of free negroes to read. *Margaret Douglass* (p. 45).

Undoubtedly there has been no greater hazard of war between the United States and Great Britain since the peace of 1815, than was incurred by the delicate and peculiar questions growing out of the trial of *Alexander McLeod* (p. 61). When that erratic individual boasted over his cups in a Buffalo tavern that he was one of the band that sent the steamboat *Caroline* over Niagara Falls he did not expect to be taken at his word and to be at once locked up in the county jail on a charge of murder. Nor did he guess the way the community felt on the subject until after he had offered bail and the judge had accepted it, the crowd took possession of the court room, forced the sureties to withdraw and the constables to take him back to prison and the grand jury to indict him for murder in the first degree.

When the news reached England there was much hubbub there and the British government requested his release. Admitting, they said, that McLeod was one of the band from Canada that had sent the Caroline over the Falls, he was nevertheless acting under military orders and the Sovereign having justified the orders and being ready to assume the responsibility, the individual could not be treated as a criminal. Our government replied that the man was in the custody of the New York courts, who would certainly do justice in the premises. But the New York courts did nothing of the kind, for the Supreme Court, Judge Cowan delivering judgment, ruled that what the International lawyers were agreed on was not law in New York and that McLeod must stand trial for murder. The English government at once demanded that McLeod be released and got ready to enforce its demand with its army and navy.¹ President Tyler and Daniel Webster, who was our Secretary of State, were in a quandary. Mr. Webster knew it was of no use to tell a foreign power that the United States had no control over the state in such matters, for the reply would certainly be: We know no such government; diplomatically, we know no more of your State of New York than you know of our Province of Wales or our County of Cornwall; we send no ambassadors to these political divisions of territories and we can look only to the sovereignties which go to compose the family of nations. The President instructed the Attorney General of the United States and the Federal District Attorney to take charge of the defense of McLeod and Mr.

¹ According to the English newspapers the squadron on the coast of Spain was ordered to be ready to sail for America, and three battalions of infantry to depart for Halifax. McMaster, Hist. People, U. S.

Webster conveyed the views of the Administration in a splendid letter which recalls to the reader the proud fact that except on one regrettable occasion, the Republic has always had at the head of its foreign affairs a great International jurist. Said Mr. Webster:

"There is, now an authentic declaration on the part of the British Government, that the attack on the 'Caroline' was an act of public force, done by military men under the orders of their superiors, and is recognized as such by the Queen's Government. The importance of this declaration is not to be doubted, and the President is of opinion that it calls upon him for the performance of a high duty. That an individual forming part of a public force, and acting under the authority of his Government, is not to be answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the government of the United States has no inclination to dispute. This has no connection whatever with the question, whether, in this case, the attack on the 'Caroline' was, as the British Government thinks it, a justifiable employment of force for the purpose of defending the British territory from unprovoked attack, or whether it was a most unjustifiable invasion, in time of peace of the territory of the United States, as this Government has regarded it. The two questions are essentially distinct and different; and, while acknowledging that an individual may claim immunity from the consequences of acts done by him, by showing that he acted under national authority, this Government is not to be understood as changing the opinions which it has heretofore expressed in regard to the real nature of the transaction which resulted in the destruction of the 'Caroline.' That subject it is not necessary, for any purpose connected with this communication, now to discuss. The views of the Government in relation to it are known to that of England, and we are expecting the answer of that Government to the communication which has been made to it.

"All that is intended to be said at present is, that since the attack on the 'Caroline' is avowed as a national act, which may justify reprisals, or even general war, if the Government of the United States in the judgment which it shall form of the transaction and of its own duty, should see fit so to decide, yet that it raises a question entirely public and political—a question between independent nations—and that individuals concerned in it cannot be arrested and tried before the ordinary tribunals, as for the violation of municipal law. If the attack on the 'Caroline' was unjustifiable, as this Gov-

ernment has asserted, the law which has been violated is the law of nations; and the redress to be sought is the redress authorized, in such cases, by the provisions of that code.

"You are well aware that the President has no power to arrest the proceeding in the civil and criminal courts of the State of New York. If this indictment were pending in one of the courts of the United States, I am directed to say that the President, upon the receipt of Mr. Fox's last communication, would have immediately directed a *nolle prosequi* to be entered."²

The opinion of Judge Cowan was in such direct conflict with well-settled principles of International law as to shock both the judiciary and the bar of the country. Though the acquittal of McLeod rendered an appeal to a higher court unnecessary, yet to destroy its authority in future cases Judge Talmadge of New York City published a masterly review of it, in which he clearly showed the fallacies of Judge Cowan's reasons and the unsoundness of his conclusions. His views were approved in letters by the most eminent living jurists, including Chancellor Kent and Chief Justice Spencer of New York, Judge Rogers of Pennsylvania, Simon Greenleaf, Judge Berrien of Georgia, Chief Justice Clayton of Delaware, Judge Huntington of Connecticut, John J. Crittenden and Rufus Choate.³

Nothing in our history shows more clearly than does the McLeod case how a trifling matter may disturb the harmony of two great nations, and how the defect in our dual system of government, state and national,

² See Curtis, Life of Daniel Webster, 2-65.

³ Mr. Webster wrote to a personal friend, "On the peril and risk of my professional reputation I now say that the opinion of the Court of New York in that case is not a respectable opinion either on account of the result at which it arrives or the reasoning on which it proceeds." Curtis, Life of Webster, 2-69.

The review of Judge Talmadge and the letters of the distinguished jurists are published as an appendix to the 28th volume of Wendell's Reports.

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may prove disastrous to the peace of the country."

It is a long call from the colonial mansion of Captain Joseph White (p. 395), which still stands in the old city of Salem, as a splendid example of the graceful architecture of the period, to the tent on the Texas plains in which young Golden was brutally put to death by his companion, *Stephen M. Ballew* (p. 324), whom the report of the trial describes as "The Inhuman Murderer," "The Expert Confidence Operator," and "Monster Liar of his Age." He was certainly a villain of the first rank and it is much to the credit of the relatives of his victim that they pursued him at much expense and through many difficulties until they delivered him into the hands of the hangman. And it was equally creditable to the chief executive of the state that he remained deaf to the appeal of the Supreme Court judges (p. 387)—an appeal founded on the manifestly absurd idea that what you cannot actually see with your eyes cannot possibly exist.

John Stuyvesant (p. 392), like the baker's little lad (p. 712), sheltered himself very safely under a rule of the criminal law, that it is never a crime to say, even though you are lying, that you are *going to do* something, though woe to you, if you pretend that you *have done* something.

This principle of the law of crimes was summed up by the editor in a little book published many years ago and long out of print, thus:⁵

The pretense must be of an existing or past fact; if it is of some future event it is not a "false pretense" within the law. A man got \$50 from another on the ground that he was going to pay his rent with it, while he intended nothing of the kind, and the lender would

⁵*Elson Hist. U. S.*

⁶*Leading Cases Simplified. A collection of the leading cases in criminal law, by John D. Lawson. Bancroft-Whitney Co. San Francisco. 1892."*

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not have let him have the money but for this representation. But it was held that this was not within the statute, as it was not a pretense of any existing fact. *R. v. Lee*, 9 Cox 304. Two men in Kentucky told old Phoebe Maybular that if she would let them take her cow to market and sell it, they would pay her what it brought and make her a present besides. The old lady agreed; they took the cow, sold it, and put the money in their pockets. Yet they were not guilty of false pretenses. "The statements made by them," said the Court, "are mere promises on their part to do and perform future acts, and in no wise relate to any pretended, existing fact." *Glacken v. Com.*, 3 Met. 233. But the distinction between a future and an existing fact is sometimes very fine. A German read in a newspaper the advertisement of one Ranney for clerks. He replied in person, and was told by Ranney that he would get him a situation at \$50 a month and board if the German would deposit \$100 as security. The German handed over the \$100, but Ranney never gave him the situation. *Ranney v. People*, 22 N. Y. 413. Several years before John Parker kept an intelligence office in Boston, and Cyrus Snell, wanting a situation as a clerk, applied to him. Parker told him that a grocer near by wanted a clerk, and had authorized him to engage one, and that on payment of \$2 he might have the situation. Snell paid the money, but got nothing; there was no grocer of the kind just then in Boston. *Com. v. Parker*, Thatch. Cr. Cas. 24. It was held that Parker was, and Ranney was not, guilty of false pretense. "I can get you a situation," was a future event, while "I have a situation for you," was a present one. It is on this ground that a man who buys a thing on credit without any intention of paying for it is not guilty of a "false pretense" within the law.

The trials of *Frank and Joseph Knapp* (pp. 395-594) not only describe a celebrated New England tragedy, but will for all time remain famous, like the Roman trials, which are preserved to us in the speeches of Cicero, because they contain one of the greatest orations of the greatest orator this country has produced—Daniel Webster,

Very simple were the facts and very clear was the proof both of the crime and the criminals. Joseph Knapp, in order that his wife should obtain a large share of a relative's estate, with the assistance of his brother Frank, hired a young desperado named Crown-

inshield to murder in his sleep the wealthy shipmaster, Joseph White, and to purloin his will. Both were accomplished; the conspirators were arrested, but before any one of them could be tried, the murderer committed suicide. By a technical rule of criminal procedure in force in Massachusetts, an accessory could not be tried until the principal had been convicted. The principal was dead, therefore neither Joseph nor Frank could be tried as accessories and would seemingly both escape punishment. However, the law also said that not only he who strikes the blow but also he who is present to aid and abet the act is a principal, and so when Joseph, who had been induced to tell the whole story through a promise of immunity stated that Frank was waiting outside the house while Crowninshield was killing Captain White, Frank was indicted as a principal. Recognizing that it was going to be a hard matter to establish this, the State retained Daniel Webster, then in the height of his renown, to assist its law officers, and Mr. Webster went to Salem to assume for the only time in his life the role of prosecutor of a capital offense. But Joseph refused to testify against his brother and Mr. Webster had to convince the jury that the latter was "present" at the murder, aiding and abetting it. Putting forth all of his masterly ability and intellectual strength he gained his point. Frank was found guilty and hanged.

If the story of the case were made the subject of a romance, it would certainly be entitled "A Tragedy of Errors," for never before or since did conspirators in crime make so many. Here are some of them:

(a) Joseph Knapp was himself the instrument of bringing to light the mystery of the whole murderous conspiracy; for when he received from the hands of his father the threatening letter of Palmer, consciousness of guilt so confounded his faculties, that, in-

stead of destroying it, he stupidly handed it back, and requested his father to deliver it to the committee of vigilance.

(b) The murder was committed on a mistake in law. Joseph some time previous, had made inquiry as to how Mr. White's estate would be distributed in case he died without a will, and had been erroneously told that Mrs. Beckford, his mother-in-law, the sole issue of a deceased sister of Mr. White, would inherit half of the estate, and that the four children of a deceased brother of Mr. White, of whom the Hon. Stephen White was one, would inherit the other half. Joseph had privately read the will, and knew that Mr. White had bequeathed to Mrs. Beckford much less than half.

(c) The murder was committed on a mistake in fact. A will was abstracted with the expectation that Mr. White would die intestate; but, after the decease, the will, the last will, was found.

(d) To the argument of Frank's lawyers that he was on the street near the house not to aid Crowninshield but out of mere curiosity to learn what his agent had done, Mr. Webster thundered to the jury: "Curiosity! Curiosity, to witness the success of the execution of his own plan of murder! The very walls of a court house ought not to stand—the plough share should run through the ground it stands on, where such an argument could find toleration." Yet if Joseph, after turning state's evidence, had not changed his mind, neither he nor his brother, nor any of the conspirators, could have been convicted. If he had testified, it would have appeared that Frank was in the street near the house, not to render assistance to the assassin, but that Crowninshield, when he started to commit the murder, requested Frank to go home and go to bed; that Frank did go home, retired to bed, soon after arose, secretly left his father's house, and hastened to the place to await the coming out of the assassin, in order to learn whether the deed was accomplished.

It was Mr. Webster's matchless eloquence that won the verdict of guilty as a principal, and it was, says his latest biographer, Senator Lodge, one of his greatest forensic efforts:

"The argument in the White case, as a specimen of eloquence, and, apart from the nature of the subject, ranks with the very best of Mr. Webster's oratorical triumphs. The opening of the speech, comprising the account of the murder, and the analysis of the workings of a mind seared with the remembrance of a horrid crime, must be placed among the very finest masterpieces of modern oratory. The description of the feelings of the murderer has a touch of the creative power, but, taken in conjunction with the wonderful picture

of the deed itself, the whole exhibits the highest imaginative excellence, and displays the possession of an extraordinary dramatic force such as Mr. Webster rarely exerted. It has the same power of exciting a kind of horror and of making us shudder with a creeping, nameless terror as the scene after the murder of Duncan, when Macbeth rushes out from the chamber of death, crying, "I have done the deed. Didst thou not hear a noise?" I have studied this famous exordium with extreme care, and I have sought diligently in the works of all the great modern orators, and of some of the ancients as well for similar passages of higher merit. My quest has been in vain. Mr. Webster's description of the White murder, and of the ghastly haunting sense of guilt which pursued the assassin, has never been surpassed in dramatic force by any speaker, whether in debate or before a jury. Perhaps the most celebrated descriptive passage in the literature of modern eloquence is the picture drawn by Burke of the descent of Hyder Ali upon the plains of the Carnatic, but even that certainly falls short of the opening of Webster's speech, in simple force as well as in dramatic power. Burke depicted with all the ardor of his nature and with a wealth of color a great invasion which swept thousands to destruction. Webster's theme was a cold-blooded murder in a quiet New England town. Comparison between such topics, when one is so infinitely larger than the other, seems at first sight almost impossible. But Mr. Webster also dealt with the workings of the human heart under the influence of the most terrible passions, and those have furnished sufficient material for the genius of Shakespeare. The test of excellence is in the treatment, and in this instance Mr. Webster has never been excelled.*

Persons who think more of technical procedure than of justice will not cease to regard the conviction of the Knapps as a judicial blunder; but of their guilt there is not a shadow of a doubt and if any murderer that has ever been tried in the United States deserved to be hanged, the conspirators who planned and carried out the death of Captain White most assuredly did.

Frank being convicted as a principal, the conviction of *Joseph Knapp* (p. 594) easily followed, for Mr. Webster had little difficulty in obtaining a verdict. It was his refusal to testify against his brother that cost

* "Daniel Webster." (H. C. Lodge.)

him his life, for he had the promise of the state that if he did so he would go free. Why did he refuse? Perhaps, as has been said, he cherished his brother's faith and trust more than life. Perhaps in the hour of despair, standing behind prison bars, he realized and repented that it was his hand that beckoned his brother from the path of right and that now, to swear his life away, was too great a burden for even a murderer to bear. Perhaps, in spite of all his sins, he felt that he could not prove false nor faithless in that crucial hour.

The White tragedy closes with the acquittal of *George Crowninshield* (p. 640), the brother of Richard, the actual perpetrator, and who certainly was cognizant of some, at least, of the details of the conspiracy. Was it to Mr. Webster's absence from the trial that he owed his life, or was it that the jury thought that in the two brothers Knapp the State had taken enough victims and the crime had been sufficiently avenged.

We have seen two men and one boy suffer death on the scaffold for the crime of arson (1 Am. St. Tr. 440; 6 *Id.* 597, 671), which was in the early days of our national life a most heinous crime directed against the property of the citizen. But when a man of property set fire to his own house, in New York City, the authorities did not feel that the statute was intended for persons like him. And so he was tried and convicted of the mere misdemeanor of endangering other people's houses by his malicious act. *John Ball* (p. 671).

The old reporter who has left us the record of this case thought Ball even more guilty and more worthy to be hanged than the Massachusetts firebugs, for he writes: "In a populous city, where insurance is, or may be, effected on the property of every citizen, for a small premium, surely the wretch who, at midnight,

fires his own house, is more culpable and, according to the policy of the criminal law, more an object of exemplary punishment, than he who fires the house from without. For, the incendiary within, having access to every part of his domicile, can, with the greater facility, carry his nefarious designs into execution, without the chance of detection; and, generally, he is actuated by the most abominable cupidity." And he suggested as a fit epitaph for the rich old culprit that of Dr. Arbuthnot on Colonel Francis Charteris:

"Think not, indulgent reader
His life useless to mankind,
Providence
Favoured, or, rather, connived at,
His execrable designs,
That he might remain,
To this and future ages,
A conspicuous proof and example,
Of how small estimation
Exorbitant wealth is held in the sight of the
Almighty,
By his bestowing it on
The most unworthy
Of all the descendants of Adam."

The trial of *Duane* (p. 676) derives its interest much more from the light it throws upon the state of society and of the political parties, than from the intrinsic importance of the offense. Politics were at a red heat in those days and partisans did not always content themselves with attacking their opponents in speech and with the pen. Even the best citizens felt it necessary to go armed not against robbers but against the violence of the politicians and their supporters. The modern laws against carrying concealed weapons had not at that time been thought of, and to carry a deadly weapon was a legal right. Even so high a dignitary as Andrew J. Dallas, a leader of the bar and a member

of the cabinet, frankly confessed that he carried a sword cane, and Mr. Hopkinson did not contradict him when he said that the attorney general did so, too.

Foreigners were not in very good odor at this period, as the Alien law shows, and there was a great demand to make naturalization more difficult. The reader will note Mr. Hopkinson's contention (p 725) that an Alien had no right of petition.

John Langley (p. 742) owed his freedom to the fact that the common law of England, which nearly all of our states adopted as their criminal code, never regarded a breach of trust as a crime. It was a crime—robbery—if one took another's property from him with force, and it was a crime—larceny—if he took it secretly without the owner's consent. But if the owner gave it to you to keep for him or do something with it for him and you refused to return it or pay for it—that was not a crime. The owner could sue for its value in the civil courts, but the criminal courts would not punish you. No one thought of sending the common carrier to jail because he did not return the goods he had received to transport, and it would have been very wrong to have done this to the little apprentice boy when he did not bring back either the cakes which his master had sent him to sell, or the money either. As to the money, young John could not be punished by the common law, even though he had spent it on himself instead of handing it over to the baker. For this, in the view of the old lawyers who promulgated our common law, was simply a breach of trust. They said that against open violence and things that a man could not protect himself against, the criminal law would protect him. One could not defend himself from the footpad who held him up on the highway and took his watch

and purse, or from the thief who sneaked into his house or picked his pocket. But it was one's own fault if the person he trusted with his property turned out to be unfaithful; he ought to have been more careful and chosen a more reliable person, said the law. Another reason was that imprisonment for debt was then in vogue, and if the party did not pay up, the common law would keep him in jail until he did. However, in modern times our legislatures have created a new crime and christened it *embezzlement*, under which John would no doubt have been caught had it not been that the New York statute expressly excepted from its provisions apprentices and persons under eighteen years of age.

A boy twelve years old, who was afterwards to become the leading advocate and most persuasive speaker at the bar of his native city, David Paul Brown,⁷ was among the spectators in the crowded court room on the day that *Joyce and Mathias* (p. 745) were tried and convicted, and long after related this curious incident concerning one of the murderers.

The earliest case that I distinctly remember was that of John Joyce and Peter Mathias for the murder of Sarah Cross. I was then nearly twelve years old, and as the murder took place in the neighborhood of my residence, was induced by youthful and natural curiosity to go to the court to hear the trial. The prisoners were defended by Richard Rush—afterwards Secretary of the Treasury of the United States, Attorney General, etc., and by Nicholas Biddle, a distinguished scholar and most accomplished gentleman, subsequently President of the Bank of the United States. In despite however of the ability and eloquence of the counsel, both of whom were very young men, though of great promise, the defendants were convicted, and shortly after, executed. The execution was much talked of among the children at the time; and as one of its mysterious and startling incidents, it was said that after Peter, who was the least offender, was cut down, by dint of the galvanic process, he was restored to life.

⁷ See 1 Am. St. Tr. 371; 6 *Id.* 107.

Years rolled round. The murder and the miracle, as it was considered, were both forgotten, when in the year 1822 (fourteen years after) Luke Morris, Thomas Harrison and Isaac T. Hooper, called upon me to defend an alleged fugitive slave from the claims of his master. The master was represented by Charles Jared Ingersoll. The case was to come before Recorder Reed who had consented to give a hearing at the Prune Street Prison, where the slave was confined.

On arriving at the place of trial I approached the respondent, and privately, as a preliminary, inquired his name. He told me his name was Peter Mathias. As quick as lightning my boyish recollections recalled to my mind the report that Mathias had been restored to life by the galvanic experiment. Scarcely doubting that the man before me was this veritable personage, and involuntarily somewhat recoiling from him, I exclaimed, "Peter Mathias! why, a man of that name was executed some years ago for murder." My astonishment was not a little increased when he replied, "Come near and I will tell you all about it." If I had had any doubts before they would have vanished. Upon approaching him, however, he soon relieved my apprehensions by the following extraordinary disclosure: "My name is not Mathias but John Johnson. I knew Peter Mathias when he was thrown into prison. I also at that time was imprisoned for an assault and battery. On the morning that Peter was led forth to execution, he called me to him and said, "John, you are a slave; I am free, here are my freedom papers, I am going where I shall not want them; they may be of use to you, take them; change your name to Peter Mathias; and if your master should ever claim you show these papers and they will protect you." Of course no honorable advocate could take advantage of such an artifice and the unhappy man was restored to the claimant. This simple story is introduced to show in what horror slavery is held by those wretched beings; and also to show how much magnanimity may be sometimes concealed under a sable skin. Had Peter been a Roman, he would have figured for this one act upon the historic page and secured an immortality of fame.^s

The conviction of *Ephraim Gilman* (p. 755) rests entirely upon circumstantial evidence. It was subsequently shown by actual experiment with the scarf, put around the neck of a man as it was about the neck of Mrs. Swan, that it could not be drawn by another, exerting all his strength, with his knee braced against

^s "The Forum." (David Paul Brown), 2-481.

the other's chest, tight enough to check respiration to any unpleasant extent. It was also found, that when the force by which the constriction was produced was relaxed, the scarf was at once loosened.*

Some interesting questions of medical jurisprudence are to be found in this case, but its chief value is in the opening speech of Mr. Virgin (p. 758). His statement of the duty of the State and of the jury; the protection which the law gives to a person charged with crime and the principles of the law of homicide should serve as a model to prosecuting attorneys everywhere. For brevity, for clearness of expression and adaptability to the need of the average jurymen, it has no superior in any similar address in this series.

Though there was what our present-day slang would call a "rough house" in the Baptist Church in New York City, yet if *John Scott* and his friends (p. 806) chose to enjoy themselves as spectators of the proceedings, that did not make them rioters and disturbers of the peace, the judge told the jury in directing their acquittal. A foundation principle of the criminal law is that it is the *doing* of a thing and not the failure to do it that is punishable, except in certain exceptional cases.

"To not do an act, even though the consequence of such omission is an injury to another, is not (except as hereafter stated) a punishable crime. One may see another struggling in the water; a rope thrown to him, or a hand held out, may save him; but he may refuse to throw the rope which is at his feet, or he may turn his head and refuse his hand, and the struggling man may be drowned. Yet the law does not charge him with his murder. Or A may see a person about to cross a river which is ordinarily fordable. But the river has been swollen during the night, which the traveler does not know, but A does. By A failing to warn him, the traveler walks into the river and is drowned. But A is not criminally re-

* Report of the Trial, *post*, p. 756.

sponsible for the traveler's death. Lord Macaulay (who was a great jurist as well as a great historian and whose Indian code is worthy of careful study at the present day) says on this subject: 'It will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted the alms knew that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed the person who required it would die.' . . . If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man, just one degree above beggary, also to be a murderer, if he omits to invite the beggar to partake of his hard-earned rice? Again, if the rich man is a murderer for refusing to save the beggar's life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar's life at the cost of a thousand rupees? Suppose A to be fully convinced that nothing can save Z's life, unless Z leave Bengal and reside a year at the Cape; is A, however wealthy he may be, to be punished as a murderer, because he will not, at his own expense, send Z to the Cape? Surely not. Yet it can be difficult to say on what principle we can punish A for not spending an anna to save B's life, and leave him unpunished for not spending a thousand rupees to save Z's life. The distinction between a legal and an illegal omission is perfectly plain and intelligible, but the distinction between a large and a small sum of money is very far from being so, not to say that a sum which is small to one man is large to another. The same argument holds good in the case of the ford. It is true that none but a very depraved man would suffer another to be drowned when he might prevent it by a word. But if we punish such a man, where are we to stop? How much exertion are we to require? Is a person to be a murderer if he does not go fifty yards through the sun of Bengal at noon in May in order to caution a traveler against a swollen river? Is he to be a murderer if he does not go a hundred yards? If he does not go a mile? If he does not go ten? What is the precise amount of trouble and inconvenience which he is to endure? The distinction between the guide who is bound to conduct the traveler as safely as he can, and a mere stranger, is a clear distinction. But the distinction between a stranger who will not give a halloo to save a man's life, and a stranger who will

not run a mile to save a man's life, is very far from being equally clear.'

"One other illustration will suffice. A pedestrian crossing a railway track sees a train crowded with passengers approaching; he sees, too, that the switch is open and the switchman asleep. By stepping aside one yard, he can close the switch, which is unlocked, or awaken the switchman. He does neither, but passes on to watch, with a fiendish delight, the destruction of scores of human beings. Yet, though his fellow-men would rightly regard him as a monster, the law would not punish him as a criminal. The reason of this is that the law goes on the maxim 'attend to your own business.' If every person, by fear of a criminal prosecution, were to feel called upon to put everything right in this world that they see going wrong, confusion would soon reign everywhere. 'Nothing can be effectually guarded when everything is to be guarded by everybody. No machinery could be properly worked if every passer-by was compelled by the terror of criminal prosecution to rush in and adjust anything that might appear to him to be wrong, or which was wrong, no matter how it might happen to appear. By this wild and irresponsible interference even the simplest forms of machinery would be speedily destroyed.'" Whart. on Hom., Sec. 80.

But where it is a man's business either by law or by contract to do a certain thing and he does not do it his omission may involve him in criminal liability. Says Macaulay:

"A omits to give Z food and by that omission voluntarily causes Z's death. Is this murder? It is murder if A was Z's jailor, directed by the law to furnish Z with food. It is murder if Z was the infant child of A and had, therefore, a legal right to sustenance, which right a civil court would enforce against A. It is murder if Z was a bed-ridden invalid, and A a nurse, hired to feed Z. It is murder if A was confining Z in unlawful confinement, and had thus contracted a legal obligation to furnish Z, during the continuance of his confinement, with necessaries. It is not murder if Z is a beggar who has no other claim on A than that of humanity.

"A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death. This is murder if A is a person stationed by authority to warn travelers from attempting to ford the river. It is murder if A is a guide who had contracted to conduct Z. It is not murder if A is a person on whom Z has no claim than that of humanity.

"A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off, it is likely that Z will be killed. Z is killed. This is murder in A if the dog belonged to A, inas-

much as his omission to take proper order with the dog is illegal. But if A be a mere passer-by it is not murder.”^s

Scott and his four companions were not constables engaged to preserve order or caretakers of the building hired to protect the church, nor had they been called on by the sheriff to assist him in quelling the riot—therefore, just to watch what was going on was no crime. But the old reporter—the same one who was not content that John Ball was not hanged for setting fire to his own house—while not criticizing the acquittal, seemed to scent some favoritism to the Catholic and Episcopal churches at the expense of the more humble and less wealthy denominations. “Reader,” he exclaims, “what think you, would be done to that boy who should, wantonly, let off a squib or cracker, during divine service, either at Trinity or St. Patrick’s church? None have yet had—they will not have—the temerity. Why, then, was such conduct, and even worse, practiced with impunity at the church of Mr. Broad? Why, think you, is it found necessary at camp meetings, in addition to a strict penal statute, if we are not mistaken, enacted expressly for the purpose, to set a strong watch and guard around the camp, to prevent riot and disorder; while churches, of the description first mentioned, require no such auxiliaries? There is no established church in this country—no union between church and state; and the day of religious intolerance and persecution has, long since, passed away.”

The surrender of the sailor, *Jonathan Robbins* (p. 811), to the British government was one of the causes of the overthrow of the Adams administration and aided largely in the defeat of the President for re-

^s *Leading Cases Simplified, ante.*

election.¹⁰ It was the first time a foreign power had made a demand on us for one of our people and our forefathers did not like it at all; they were not used to the extradition idea and none of the provisions of the Jay treaty were popular. It was made a party question in Congress and though John Marshall, who was then a member of the House of Representatives, in a great speech very effectually floored the opposition by showing very clearly that there being a treaty creating a particular obligation and no mode prescribed for its discharge, it became the President's duty as the nation's executive to perform that obligation, yet when the elections came on, the political orators at every cross road denounced the President and the President's judge who had given up the American sailor to the British hangman. "Poor Robbins," they cried, "is now no more! In vain he pleaded that he was a citizen of the United States. Ill-fated man, to be born in America! Had he been a Swede or a Dane or a Russian or a Prussian it would have been different. The assertions of a lot of British bullies are taken rather than the solemn oath of an American mariner. The man who does not feel indignant at the fate of Robbins is a fit instrument in the hands of the villains who are anxious to destroy the liberties of our country; he is fit to be an assassin; he is fit to be a helot. If British oaths and British money can make American judges deliver a fellow citizen to the fangs of tyrants, they can do anything. The fate of Robbins may be any man's tomorrow."¹¹ Such appeals gathered in many votes and helped to elect Thomas Jefferson to the presidency.

¹⁰ 1 Moore on Extradition, 360.

¹¹ "At the last moment of his life, Nash followed the custom of the criminals of his time, made a confession and owned that Ireland was his native soil." McMaster, Hist. People U. S. II, 447.

The trial of the charge of libel against the editor and publishers of the *Dew Drop* (p. 832) marks almost the beginning of the temperance movement in the United States. These were the days when by newspapers, books and pamphlets and upon the platform it was sought to make men sober by convincing them of the perils of strong drink. The speech of Mr. Stanton, the editor's lawyer, shows how strong was the faith of its advocates and how well they were equipped by both pen and speech to persuade the doubting. The leader of the group to which Mr. Stanton belonged was *John B. Gough*,¹² probably the most eloquent and most effective public speaker of the reformer type this country has ever known, and whose oratory and argument were never once degraded by either vulgarity or blasphemy.

There was not one of the humble citizens who sat as jurors on the trial of *John Landon* (p. 893) who did not feel that it was quite as wrong for the legislature to take away a man's property without paying for it as it would for an individual to do the same thing, and in this they simply echoed the best opinion of the time and of the state courts. But what may be called the modern American doctrine—for it is quite unknown in other nations calling themselves civilized—is growing more popular with us every day, viz., that a majority of the voters may destroy any private property they please, provided it is done under the guise of the public good. The immortality of this is not lessened because the Supreme Court of the United States has decided that the Constitution when it declares that private property shall not be taken for public use without paying compensation to the owner does not include the police power. Unhappily, it has led the people to think that everything that is constitutional is right.

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THE TRIAL OF ISRAEL THAYER, JR., ISAAC THAYER AND NELSON THAYER FOR THE MURDER OF JOHN LOVE, BUFFALO, NEW YORK, 1825.

THE NARRATIVE.

Nelson, Israel, Jr., and Isaac Thayer¹ were the sons of Israel Thayer, a farmer residing near Buffalo, New York. Nelson and Israel, Jr., were married and had separate houses, but Isaac, being unmarried, lived at home. The land being very good, they had little trouble in raising enough for their support; but they were indolent and dissipated; they neglected their work for the tavern and shooting matches, and very soon found themselves in debt to many of their neighbors. In October, 1824, things had become rather bad and they were threatened with suits and even imprisonment for their debts, when there appeared on the scene a man named John Love, who came from nobody knew where, and who boarded with Nelson Thayer. Finding that Love had no regular employment, but had a good deal of money, from which he obtained his income by loaning it in small sums and for short periods, the brothers had recourse to him to relieve their

¹ They were born in Worcester County, Massachusetts, where their father was a farmer. He removed west in 1817 and settled on a farm in Erie County, New York, near a village called Boston. The land was fertile and the family had little trouble in raising enough from the soil to support them. But the boys were indolent and inclined to dissipation. In 1819, Nelson the eldest and in 1824 Israel, the second, married. They took up separate farms while Isaac remained at home. The two married ones soon got into debt and were threatened with lawsuits when John Love came to the place and boarded with one of them. It was not long before they began to borrow of him until they owed him a considerable amount, which they had no means of paying. At the time of the murder Nelson was twenty-five, Israel twenty-three, and Isaac just twenty-one years of age.

financial embarrassment. But it was not long before they were in the same trouble with Love that they were with their neighbors. Their affairs getting worse day by day and seeing no way to settle with Love, they formed the idea of taking Love's life, thus relieving themselves of his claims and possessing themselves of his property at one stroke.

They talked the matter over for over a month before they could bring themselves to the starting point. They finally agreed that on the night of December 10 the deed should be committed. On that day Israel, Jr., was to butcher his hogs at his home and as that would cause much blood about the house they thought it a good time for their purpose. A boy who lived at Israel's, as well as Israel's wife, were induced to go on a visit to a neighbor and Love was invited to spend the night with Israel. Love was sitting by the fire talking to Nelson when Isaac came to the window and shot him through the head. But on finding that he was not dead he was dispatched by Nelson with a meat axe. They then threw the body out of the house and secreted it, and after Nelson and Israel had finished cutting up the hogs they carried it into the woods and buried it.

The brothers at once took possession of all of Love's cash and a number of notes made by themselves and others and commenced disposing of them. Finding a power of attorney necessary for the collection of the debts, they forged one and began suits for the demands. They gave out that Love had gone away, leaving them in charge of his property, and little suspicion seems to have been aroused, until late in February, 1825, when a body was found in the woods and identified as Love's. The three brothers and their father were at once arrested and taken to the Buffalo jail. They were indicted for the murder of John Love (the father having proved his innocence) and after two trials, one of Isaac and Israel together, and the other of Nelson alone, they were convicted of murder, and having made a full confession of the crime, on June 17 the three brothers were hanged on the same gallows, in a field near Buffalo, in the presence of over 20,000 spectators.

THE TRIAL.²

In the Court of Oyer and Terminer, Erie County, Buffalo, New York, April, 1825.

HON. REUBEN H. WALWORTH,³ *Circuit Judge.*

April 21.

The prisoners, Israel Thayer, Jr., and Isaac Thayer, had been previously indicted for the murder of John Love and had pleaded *not guilty*.

Herman B. Potter,⁴ District Attorney; *Sheldon Smith*⁵ and *Henry Brown*,⁶ for the People.

² *Bibliography.* *"Trial of Israel Thayer, Jr., Isaac Thayer and Nelson Thayer for the murder of John Love, at the Court of Oyer and Terminer of Erie County, at the court house in Buffalo, on April last, his honor Reuben H. Walworth, Circuit Judge for the Fourth Circuit, Presiding. Including their confession. Printed for the publishers, July, 1825." The title page of this report and the next two pamphlets are ornamented with pictures of three coffins.

*"The Life, Condemnation, dying address and Trial of the three Thayers who were executed for the murder of John Love at Buffalo, New York, June 17, 1825. Buffalo. Printed for the publishers. 1825."

*"The Life, Trial, Condemnation and Dying Address of the three Thayers, who were executed for the murder of John Love at Buffalo, New York, June 17, 1825. Buffalo. Printed for the publishers."

*"Trial of Israel Thayer, Jr., Isaac Thayer, and Nelson Thayer, for the Murder of John Love, at the Court of Oyer and Terminer of Erie County, at the court house in Buffalo, on the 21st, 22nd and 23d days of April, 1825; before his honor Reuben H. Walworth, Circuit Judge for the Fourth Circuit. Including the Testimony, Arguments of Counsel, with the substance of the Charge to the Jury, the Sentence of the culprits, and their subsequent Confession of the crime. Reported for the publisher by James Sheldon, Counselor. Printed and published by H. A. Salisbury, Buffalo. 1825."

³ WALWORTH, REUBEN HYDE. (1788-1867.) Born Bozrah, Conn. Admitted to the bar and began practice in Plattsburgh, N. Y. 1811. Representative in Congress, 1821-1823. Circuit Judge, 1823-1828. Appointed Chancellor of the State of New York, 1828, holding that office until it was abolished in 1848. Author of Rules and Orders of the New York Court of Chancery; The Hyde Genealogy. Died at Saratoga Springs, N. Y.

⁴ POTTER, HERMAN B. Early lawyer of Erie County, N. Y. Settled in Buffalo, 1810, and began practice. Was prominent in or-

*Thomas C. Love,*⁷ *Ebenezer Griffin*⁸ and *Ethan B. Allen*, for the prisoners.

The Court asked whether counsel for prisoners objected to their being tried together and they replied that they did not.

ganizing the Washington Benevolent Society, Federal Club, and first Masonic Lodge. Was appointed District Attorney of Niagara County two years before Erie County was formed, and held the office, 1819-1829. Had a large and successful practice and was noted for systematic industry, high integrity and kindness of disposition. Chancellor Walworth, who presided as Circuit Judge in the trial of the Thayers, for which Potter had arranged all the evidence, declared in later years that he had never known a case so well prepared and tried. Mr. Potter was known as General, from his connection with the militia. He amassed a large fortune. He died in 1854. See White (Truman C.), Erie County, N. Y.; Smith (H. Perry), Hist. of Buffalo and Erie County; Buffalo Hist. Soc., v. 4.

⁷SMITH, SHELDON. (1788-1835.) Settled in Buffalo, 1820, and continued in active practice until his death. Was powerful as an orator and delivered the address, October 26, 1825, when the first boat left Buffalo on the Erie Canal. Was one of the most reputable counselors of western New York. Remained devoted to the law and did not seek political position. See White (Truman C.), Erie County, N. Y.; Smith (H. Perry), Hist. of Buffalo and Erie County.

⁸BROWN, HENRY. (1789-1849.) Born Hebron, Conn. Graduated Yale, 1808. Admitted to bar about 1813 and began practice in Cooperstown, Otsego County, N. Y. Removed to Stark, Herkimer County, and served as Judge of County Court, 1823-1825. Established extensive mills and other industries in Stark. Returned again to practice in Cooperstown. Removed to Chicago, 1863. Justice of the Peace, Chicago, 1837-1839. City Attorney, 1842-1843. Published in 1844 "History of Illinois." Died of cholera, in Chicago. See Yale Biographies and Annals, 1805-1815; Bateman Hist. Encyc. of Ill.; Andreas Hist. of Cook Co., Ill.

⁹LOVE, THOMAS C. Judge Erie County Court, 1828. District Attorney Erie County, 1829-1836. Member United States Congress, 1841-1845. Died in Buffalo, 1853.

¹⁰GRIFFIN, EBENEZER. (1789-1861.) Born Cherry Valley, N. Y. Attended Union College two and one-half years. Admitted to Utica bar, 1811. Practiced at Clinton, Oneida County for eight years, then removed to Utica and practiced there until 1825, then removed to New York City. His reputation was state wide. Practiced in Court for Correction of Errors and in Supreme Court in numerous important cases. Distinguished, gifted and upright. Removed to Rochester in 1842 and died there. See Proctor Bench and Bar of N. Y.; Hist. Bench and Bar of N. Y.

The Clerk called the Jury.

John Barth being called.

Mr. Love. Have you made up an opinion as to the guilt or innocence of either of the prisoners.

The COURT. That question is improper. Have you formed and expressed an opinion as to their guilt or innocence?

Mr. Love. We object to any juror who has formed an opinion, whether he has expressed it or not, and think we can show that to be the proper question.

The COURT. The juror must have expressed an opinion, as well as formed it, if this is intended as a principal challenge, and not a challenge to favor.

Mr. Love. We except to the decision and insist upon the right to put the question whether the juror has made up an opinion; and if he had, to exclude him. If his opinion be made up, it is of little consequence to the prisoner whether it has been expressed or not. None of the authorities decide that the having formed an opinion was not sufficient to exclude a juror and the reason for it was as strong where an opinion had been formed, as where it had been expressed, if not stronger.

The COURT. A juror having expressed an opinion, it is to be presumed that he will be more biased and apt to adhere to it. than if he had not expressed it.

The juror was then peremptorily challenged.

The following jurors were sworn: James Clark, Thomas Decker, Reuben Rodgers, Geo. Blackman, J. P. Morey, S. Slade, O. Mansfield, L. Evans, M. Dunn, E. Knight, R. D. Crego, J. Brown.

THE DISTRICT ATTORNEY'S OPENING.

Mr. Potter. Gentlemen: The cause now to be submitted to you is the most important that can occur in human jurisprudence, a cause which requires the exercise of all your candor and intelligence. It has fallen to your lot to sit in judgment upon the lives of two of your fellow men. The prisoners stand indicted for the murder of John Love, have pleaded "not guilty," and have put themselves upon their country, which country you are. The crime charged is one of the deepest die, the most abhorrent and revolting to our nature; it equally shocks the feelings of the civilized man and the savage. We find in every human breast the same horror of the crime, the same dread and detestation of the perpetrators. The crime has been known from the beginning, it is to be heard of in our first records, we are not to look for its history in our statute

books alone. It is to be found in every page of the history of man. But for its punishment we look to the laws of the land, the laws of nature and the laws of God. It equally contravenes them all and all equally denounce the crime and declare the penalty. "Thou shalt not kill" is a law announced by the great lawgiver of the universe, to which nature and human reason, and the wisdom of ages have responded assent.

An essential ingredient of the crime of murder is malice, or the intention of killing. Malice is either express or implied; with the latter we have little to do, or with the implication of law in particular cases of homicide. Every killing of a human being is not to be accounted a murder. Malice aforethought, or a determination to kill is essential to constitute this crime. Judge Blackstone defines murder to be "the unlawful killing of any reasonable creature in the king's peace with malice aforethought, by a person of sound memory." Express malice is now the grand criterion which distinguishes murder from other killing. It is defined to be a sedate, deliberate determination of the mind, and a formed design to do the injury, which formed design is evidenced by external circumstances, as lying in wait, previous menaces, former grudges and concerted schemes.

From these definitions, I apprehend no difficulty as to the evidence of express malice in the case before you. As to John Love's death, it will be shown to have been most awfully and too successfully premeditated. We are next to make out by whom the crime was perpetrated, or rather that it was done by the prisoners, or that they were instrumental in it. For, if more than one person be engaged, it is no matter which gave the fatal blow, or discharged the fatal bullet; so as the others were present aiding, abetting or assisting in the act. The law in such a case makes them all principals. This inquiry will involve an examination of a long and tedious train of circumstances. And to this investigation I must invite your particular attention and solicit the fullest exercise of your patience.

When crimes so flagrant and so universally abhorrent as the one charged are committed, witnesses to the fact are not

often called upon. The murderer hides his head from humanity and the light. The deed is done in darkness and in private. The intention is to evade discovery, and resort is had to solitudes, where there is no human ear to hear, nor eye to detect, nor human arm to stay the fatal blow. Such was the case of the murderers of John Love. There was no suicide, as will clearly appear from the testimony. But whether murdered in the day time or the night, the foul deed is enveloped in midnight darkness. It will not of course be expected of me to produce positive evidence of the infliction of the blow, or the discharge of the bullet that launched him into eternity. From the nature of the case, that evidence does not exist for the public prosecutor. But I expect to prove such a train of circumstances, such a connected chain of facts, perfect in every link, as to remove from your minds every reasonable doubt; and possibly every vestige of skepticism that the prisoners are the murderers.

If you find satisfactory evidence of the prisoners' guilt, you are bound to act and I trust will independently decide them to be guilty.

As the evidence will be of the kind called presumptive, I will read an authority as to the nature of such proof. Phillips on Evidence says:

"The proof is positive, when a witness speaks directly to a fact from his own immediate knowledge; and presumptive, when the fact itself is not proved by direct testimony, but it is to be inferred from circumstances, which either necessarily or usually attended such facts. It is obvious, therefore, that a presumption is more or less likely to be true, according as it is more or less probable that the circumstances would not have existed unless the fact, which is inferred from them, had also existed; and that a presumption can only be relied on, until the contrary is actually proved. In order to raise a presumption, it cannot be necessary to confine the evidence to such circumstances alone, as could not have happened, unless they had been also attended by the alleged fact—for that in effect would be to require in all cases evidence amounting to positive proof—but it will be sufficient to prove those circumstances which usually attended the fact. If the circumstantial evidence be such, as may afford a fair and reasonable presumption of the facts to be tried, it is to be received and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently

satisfactory and convincing to warrant them in finding the facts in issue. However, for the purpose of trying the weight and effect of such presumptive proofs it will often be of the utmost consequence to consider whether any other fact happened which might have been attended by the same circumstances, and with which of the facts they are more consistent.

"It has been very justly observed that when the proofs are dependent on each other, or when all the proofs are dependent upon one, the number of proofs neither increase or diminish the probability of the fact; for the force of the whole is not greater than the force of that on which they depend; and if this fails they all fall to the ground. But when the proofs are distinct and independent of each other, the probability of the fact increases in proportion to the number of the proofs; for the falsehood of one, does not diminish the veracity of another."

Positive proof, if unimpeached, precludes all possibility of error. Circumstantial leaves a possibility of mistake. But the latter is often more satisfactory and convincing than the former. A single witness may swear false. A number of unconnected and distinct circumstances, each depending on itself and proved by different witnesses all bearing upon the same point and tending to the same result, must together speak the language of truth. If circumstances are shown which the prisoners might rebut, but neglect or decline it, they must be taken strongly if not conclusively against them; and the conduct and efforts of the prisoners in such case being assisted by able counsel, will materially affect the force and influence on your minds of the circumstances which I am about to produce. I will not go into a detailed statement of the facts as I expect to prove them. The facts will present a horrible picture of human depravity and the terrible effects of human passions when urged on by vengeance or cupidity, and must necessarily rouse every breast to indignation. But I wish to give no occasion for the complaint that the jury had in the outset of the trial been prejudiced by the statements of counsel. The jury ought to be cautious and diligent in the investigation in proportion to the heinousness of the crime. The cause is an important one. The life and death of the prisoners are in their hands, and for the sake of justice and the peace of their own consciences the jurors should discharge their duty with caution and fidelity. Try them on

the law and evidence, not on the rumors or stories that are afloat. They had doubtless been tried over and over again in this county, and particularly in the circles in their neighborhood and perhaps generally pronounced guilty. But this was the first time they had been arraigned for a legal trial. This is the first time you hear of them or their offense—if they are guilty you must so find them. If so, they are unfit for human society. It will be urged to you that there exists great excitement in the public mind against the prisoners. There is excitement undoubtedly. But that there is or has been undue excitement on this occasion, I deny. On the announcement of so flagrant a murder as appears here to have been perpetrated, is it strange that excitement should prevail? The whole community ought at once to arm and turn out for the discovery of the felons. The alacrity and vigilance of the people of Boston is an evidence that their moral sense still exists and that virtue still prevails amongst them. With such a people your life and property may be considered safe. But prejudice or excitement cannot alter guilt or innocence. Truth is and will be the same.

THE TESTIMONY FOR THE PEOPLE.

Daniel Ingalls. Am a physician. Was called on 24th Feb., 1825, to hold an inquest, as Coroner, on a body found in Boston, near Israel Thayer, Jr.'s. There appeared to be a ball hole entirely through the head, which passed in at the right side of the head and out of the other. It would not produce instant death. He might have lived a few hours, perhaps days. There was another wound on the back of the head near the crown or vertex—fractured the skull bone—appeared to be done with the head of an axe. The effect of this wound would be to induce stupor and probably would terminate in death. There was another bruise behind the left ear, I believed to

have been given with the same instrument as the other, most probably the head of an axe. There was another wound across the face or cheek extending down to the wind pipe. Part of the cheek was cut down to the bone—not cut off. The flesh on the upper and lower jaws was partly cut off, so as to leave the bone bare on both jaws. The neck appeared to be broken. The two bones forming the bridge of the nose were broken down; flattened down entirely. The body appeared to have been partly frozen, especially the feet and fingers.

Cross-examined. Cannot determine whether the ball was from a pistol, a musket, or rifle;

as to the instrument that gave the wound on the back of the head, thought it an iron instrument, most likely an axe. Can form no judgment as to the time body had been dead, whether four, eight or ten weeks. That depends materially upon circumstances connected with his life, habits, manner of death and burial.

Emmons S. Gould. Am a physician. Examined this same body with Dr. Ingalls, on the 23rd or 24th of February. The wound through the head appeared to be made by a ball which entered on the right side below the angle of the eye, and came out close to the outer angle of the left eye. In passing down, the instrument appeared to have injured the bone, which appeared to be fractured; the under jaw was dislocated, or so injured by the blow, that the integuments had given way. The wound under the left ear was upon the hard bone. The skin was broken and flesh bruised, but could not discover that the bone was broken. It would require a hard blow to fracture that bone. These wounds must altogether produce instant death. The neck was dislocated at the atlas or first vertebra. I cannot say whether instant death would ensue. Judged there must have been two blows, one on and down the cheek, and another below, on the neck, which might dislocate it.

F. T. Jones. Found the body the day before the Coroner's inquest, in a field on Israel Thayer, Jr.'s land, about 30 rods from his house, near the footpath from Israel's to Irish's. The grave was directly in the old pathway. It had been an old road before the

land was cleared. The body lay in the old path near a large log. Think the grave might be seen from the new path. That morning while I was summoning the people to assist in making search for the body, Mr. Britton gave me some information that induced me to search this field of Israel's particularly. One of my company soon discovered the grave. The body lay as close to the log as a grave could be dug. The grave was short and narrow. The ground was frozen over the body. We dug down at about the middle of the body and found the great coat I had known Love wear. On opening the grave further we discovered the foot of the body. Left the grave and went to arrest Israel, Jr., and his father at Nelson Thayer's, whom I arrested, and came to Esquire Rector's. On my return to the grave the company had removed all the earth from around the body. It was laid on a board and carried to the school house, where the Coroner's inquest was held. Have no doubt it was the body of John Love. I have known him about two years. Requested Israel Thayer, Jr., to help me in the search. He declined, but gave no reason.

John Stafford. Am the person who found the body first, but was not there when he was uncovered, nor did I see his face until he was taken to the school house. There examined it and have no doubt it was the body of Love. Also knew his clothes.

Cross-examined. On my arriving near the place of the grave, I discovered that some things had been stirred—an appearance that some old chunks of wood had been moved. Called

out to the company that I had found him.

Reuben Irish. Live one mile from Nelson Thayer's and rather more from Israel's. Saw Love on 15th of December last about sundown at Nelson Thayer's door, holding his colt by the bridle. Mr. Washburn was there, and Nelson was chopping wood at his door. Love had on an old grey great coat, or a sort of roundabout. A cap on his head. Love and Nelson left there together and went toward Israel's. Israel went first, then Isaac, and Nelson and Love followed; Love on horseback, but being detained in mounting his horse, Nelson left him rather behind—he, however, soon overtook him. Have not seen Love since; do not know as he has since been heard of.

Cross-examined. To go from Nelson's to Israel's, you pass the sawmill, which is about 50 rods from Nelson's. When I saw them it was nearly dark, and they had not reached the sawmill. Think that Isaac did not go to Washburn's, as I went home with him and did not see him there; I have a strong impression that these prisoners left Nelson's together.

Salmon Washburn. Knew Love well, and saw him last on the 15th of December, at Nelson's, about sundown, as also these prisoners. They all four left there and went towards Israel's. Nelson got before Love while he was mounting his colt. Know the coat spoken of, and had often seen Love wear it. It was the same that I saw at inquest.

William Thompson. Saw Isaac on 15th of December at Nelson's. Saw Love after sundown pass

the sawmill with Nelson, and cross the bridge towards Israel's; and saw one of these prisoners just ahead. Cannot say positively that I saw Isaac there, but Israel was ahead and crossed the bridge first, before Nelson and Love.

Sally Thayer. Am wife of Nelson Thayer. Knew Love well. Saw him last at my house, but do not recollect the day; it was towards evening. Isaac was there in the morning, but went on a visit to Obed Gwynns, and returned in the afternoon and was there when Israel came. Love came there soon after. Israel asked Nelson to go and help him cut up his hogs, which he declined till morning, and said the pork would not spoil until morning. He then asked Love to go home and stay with him all night, which Love also declined, and said he would stay at Nelson's. Nelson concluded to go and help Israel; Isaac also consented to accompany them on Israel's request, and Love being again requested, said he did not care if he went if Nelson did. They then all left the house nearly together. It was then about sundown, and I saw no more of them that night, except Love was detained in getting on his colt. Saw no rifle with them that day, nor have I seen Love since that time. Isaac came back next morning early, before I was up. He did not live with us, he made it his home at Washburn's. He did not breakfast with me: think he said he had breakfasted at Washburn's.

Pardon Pierce. Live one mile from Israel Thayer's, nearly north. About 15th of December last, heard the report of a gun in

the night, at late bedtime, in the direction of Israel Thayer's. Thought there might be shooting at candles, as was sometimes the case at Nelson's. But the report was more directly from Israel's.

Cross-examined. Can distinguish between the reports of rifles and muskets. Muskets give a longer report, and which can be heard further. Was my opinion at the time that this was the report of a rifle.

Betsey Rector. Live about half a mile nearly west of Israel's, with father. Heard a report of a gun on the evening of 15th of December, in the direction of Irish's, probably after 10 o'clock.

Cross-examined. Heard no other gun in the evening last fall. On the Monday previous, Love had requested me to make some clothes for him, and said he would fetch them there the next Saturday, on which day I heard he was gone. Heard suspicions of his murder before any of the prisoners were taken up.

Abigail Andrews. Visited at Mr. Rector's on 15th December last. When I passed Israel's house, he was killing hogs.

Cross-examined. Went to bed about 11 o'clock that evening, and do not recollect of hearing any gun. Do not recollect of hearing a gun on any other night.

Benjamin Sprague. Live about half a mile from Israel Thayer's, nearly northeast. Heard a report of a gun on 15th December. My wife and I thought it nearly 11 o'clock in the evening; seemed to be about Israel's house. When I went in, wife asked me what the firing of a gun so late meant. Thought probably an owl might have gotten among some neighbor's hens.

Rufus Andrews. Live about 50 rods north of Israel's. Wife went to Rector's on a visit, but do not recollect the day. Heard the report of a gun one evening, a little before 11 o'clock.

Daniel A. Pierce. Am 11 years old—can read some, but cannot write. Must not, when on oath, tell a lie, but must tell all I know. I lived at Israel's when he killed hogs, and that evening Israel told me I might go home and stay that night. In the morning at daylight started to go back to Israel's. Met Isaac and Nelson, going towards Nelson's, about daylight. Got my breakfast at Israel's. Israel's wife said they had breakfasted two or three hours before I got there. After that time Israel sometimes asked me to go with him to the barn in the evening, to feed the horses; which I did several times. Once he called me out of bed to go with him, and I helped him feed the horses—I put out the hay, and he put it in the rack. He could have gotten the hay without me.

The *Prisoner's Counsel* wished to know the object of this inquiry—they could see no bearing it had upon the case, unless it went to show that Israel was conscience-stricken, and afraid to be alone in the night. *Mr. Potter* replied that such was the object; and observed that almost any person who had committed so foul a murder would recoil at being alone in the night.

Pierce. Was not always taken to the barn after the hogs were killed. Lived with Israel till he was taken up on this affair. Love had stayed there all night—had his colt in the barn, and slept with me. This was a few days,

say five or six, before we killed hogs. Saw his colt in Israel's barn two or three days after we killed hogs. Israel told me it was his own colt. It was kept there till Isaac took it away; and while there Israel took care of it. He said he was going out to do it, and that it was his colt. Have heard the Thayers say they did not believe Love was dead; and that they would have him brought back to this county again. Know of Love's staying but one night at Israel's. They then came together, and brought his colt. Have never seen him since that time. He used to wear a fur cap. Have not seen his cap since. Israel has a wife and a child of a few weeks old, and no other family, but a person named Mattison lived there and chopped wood a while.

Barney Herrington. About the 20th December last, heard Isaac say he had a note against me for wheat, which I had given to John Love. We were at P. Atwell's, but he did not exhibit the note. He told Atwell that he had a note against him, which he had given to Love. He told me that Love had cleared out—had gone away. Had heard such reports before, but only as coming from the Thayers. He said it was d—d strange that Love should find out that people were after him before others did. He demanded payment of the note, but did not say how he came by it.

Cross-examined. Do not know he stated any reason for Love's going away, at that time. Had previously heard of Love's having run away for forgery, committed in Pennsylvania—supposed Israel alluded to that. Delivered the wheat, on my note, at Ensign's mill, where it was

payable, and gave Isaac an order to get it, and he gave me my note. Took my name off the note and wrote the order on the back of it. Atwell told him he would want wheat for Christmas, and asked whether he would want wheat on his note? He agreed he would. I live about half a mile from Nelson's. Love was frequently in that neighborhood. He was a short man, not 5 feet 10 inches high, and would weigh about 130 pounds; and was from 25 to 30 years of age. Do not know as he was a very singular or odd man; never saw him quarrel; he was a temperate, sober man. For two winters he had been there trading and traffick-ing. In the spring he would go up the lakes, and return again in the fall. Know of no stated home or residence of his there. He was a close man, and made good bargains. People knew but little of his business, except from day to day. He often went off without people's knowing where. Never saw him have much money—have heard of his loaning money in small sums. Saw the body after it was taken up, and believe it to be his. Gave him my note for five bushels of wheat, at a year, for four bushels received of him.

Wendell Morton. Had heard that Love had run away; and about the Sunday before Christmas asked Isaac where Love was. He stated he had cleared out, gone—but did not say where. Told him I understood he had a clue on Love's property; he replied, he guessed likely enough he had. Told him if he had, and did not shave him as hard as he used to shave others that I would flog him—"Shave" was a mighty

word with Love—he answered, “Damn him, I guess he is where he will not trouble me.”

Cross-examined. Had understood that Love cleared out on account of having forged a note, somewhere up the lake. Understood Isaac’s last reply as alluding only to his absconding for the forgery.

Borden Thomas. Love had a note against me last fall for six and a quarter bushels of wheat. Isaac received the wheat of me and gave up the note. When he asked me for the wheat, he told me Love was gone off.

Sylvester Irish. In January, heard Isaac Thayer say Love was gone. Asked him how he had secured Love for the property he had gotten of his; he said he had secured him in no way. Told him I expected Love had all his articles of land; he replied that he could convince me to the contrary, for he then had part of them in his pocketbook, and produced an article of a lot on Chestnut Ridge, that formerly was Nelson’s. It appeared to have been assigned to Rector, and by him to Isaac. Had understood that a reward of \$1,000 had been offered for Love. Asked Isaac where he was. He asked my reason for the inquiry. Told him I wanted to know; he replied he did not know. Said we all thought he did know; that he always saw him when he went to Buffalo, or else when at a distance. Asked him if he would show Love to me for my oxen, or if I would add my rifle also. He answered, “No, by G—; I would not for \$200.” He had before this intimated that he saw Love when he went away, as he often did. Was at home the

night Israel killed hogs, and no gun was fired at my house. Isaac was there a part of the evening, when it was said they were killed. Heard of the circumstance that evening, and that Nelson was then with Israel cutting them up. Got home about sunset, or very near night. My family then consisted of my wife and three children, of whom the oldest was seven years. Isaac came there early in the evening and stayed perhaps an hour; Israel and his wife came in during his stay. He appeared to have come to bring his child, and returned immediately, leaving his wife behind. In the evening Mrs. Thayer sent Isaac home to get a diaper for her child. He was gone nearly an hour and returned with it, and he stayed but a short time. Mrs. Thayer stayed till late. When she sent Isaac home my wife offered to lend her something for her purpose, and requested her not to send him. She gave her something for her purpose, but I do not know whether she used it. Isaac, however, went and brought three, four or five diapers. Her husband came down after her, and he then stayed the best part of an hour. I saw no gun that evening. One morning before we were up, Isaac came in with his rifle, but I cannot say whether it was before or after the hogs were killed. He wanted it cleaned and cut deeper.

Cross-examined. Understood that Israel went back to cut up his meat after bringing his wife. He came after her as late as 9 o’clock, and stayed some time. Saw Isaac first, about dark; he then stayed about an hour. My wife offered Mrs. Thayer a towel for her child’s use, and Mrs. Thayer refused to use it. When

Israel came for his wife, we had some talk about cutting up his pork. He appeared in no hurry to go home; he went away between 9 and 11 o'clock. When Isaac brought his rifle in to be repaired, he set it down and said, "If you are going to cut my rifle, by G—d I want to know it." Told him I could not do it; but he left it and went away. Love's colt was some days at Israel's. Saw Isaac take him from Nelson's stable, and start for Buffalo. When he returned, asked him what he had done with it. He told me how hard he had rode, and how the colt hung his ears before he got to his journey's end. Heard Nelson tell him, perhaps you had better take the colt along, as you may find the short fellow—meaning Love—and if you do, deliver him up and let him do as he pleases with him. He led the colt, and rode another horse. They must have known that I heard Nelson's direction to Isaac.

Mrs. Melinda Washburn. When Isaac was under arrest for this, asked him why he did not tell where Love was; he replied he was so damned contrary that they could get nothing out of him. He represented that he knew where he was, and that he was some distance off. On 17th December, Isaac stayed at my house a part of the night. His father called him up, about 12 o'clock, and went away; he did not return that night. It was the night but one after Israel's hogs were killed. He had been away all night two nights before and said he had stayed at Israel's. He came next morning about sunrise and ate breakfast; told me he came to Nelson's, whose wife was not up, and so he came and

breakfasted at my house. The night he was called up he slept in the new part of the house; his father came in and asked where he was; went in and woke him and they came out together; he went away instantly, but Israel dressed and soon followed. All I heard the father say was, "Isaac, it is time to get up." He had slept at our house three or four nights. Think I saw Love on the 15th December ride towards Nelson's, on Nelson's mare. Heard no gun on the night of the 15th December. We live three-fourths of a mile from Nelson's. A few nights before, or after, there were, I presume, ten guns fired at Nelson's; if I had heard a gun on that night, I should not have thought it strange.

Benjamin Fowler. On 23rd or 24th December, purchased a colt of Isaac—a light, yellow 3-year-old colt, and paid him \$40. He mentioned that he was going on the next day, Christmas, to a shooting match. He led the colt and rode a bay mare. He was round the day before endeavoring to sell the colt, and said if he could not sell him to his mind, he should go to Batavia with him. Told me he lived in Boston, and that the colt was the same one that Thayer had down here in the fall; that he had him of his brother. Nelson, I knew, and he had a colt here in the fall.

Judah Simons. On 20th December, Israel met me about one mile from Nelson's. He was on Love's colt—a yellowish colt. He offered to sell the colt to me. Stated he had not bought the colt, but was authorized to sell it by Isaac, who had all Love's business to transact. Know both

the prisoners well. It was Israel who had the colt, and offered to sell.

Sally Thayer. Am wife of Nelson. Isaac came to our house on the 7th of December, in the fore part of the evening. The father was there at the same time and wished him and Nelson to help him at the mill in getting on a large log. They said they would not go then, but would get up before day and assist him. Isaac went away to Washburn's, where he then slept. The father went to bed. Between midnight and daylight he got up and called Nelson to put on the log. He then went away after Isaac and soon came back with him. Isaac then asked Nelson if he was not going to get up; and he then went away. The father came back in a few minutes, and said it was so dark that he would not then put on the log; and he lay down on the floor. Nelson and Isaac returned just before daylight. They took no lantern nor light with them; we had no lantern.

William Thompson. Tended the sawmill on 15th December, but was not there on the 17th. Left some logs on the way; do not recollect of any very large ones. The father is rising of 50 years old, and not a rugged man. He was not in the habit of sawing unless some one was with him.

Rufus Andrews. Saw Israel on the morning of the 16th or 17th December. He came to borrow flour. I had none—he turned to go away, but then turned back, and asked if I had seen Love. I answered, no. He replied that he did not know but I might have seen him come along down.

E. Walden. Isaac was brought before me on a *habeas corpus* soon after he was committed. The object appeared to be to fix a time for them to produce Love, or proof of his being then living to satisfy me. Asked Isaac where Love was, he said he was in Canada along the river between the Bertie Ferry and Queenstown; he could not tell me the exact place. Before Saturday the body was found. Isaac said he could easily produce Love by Saturday and wanted no longer time.

N. D. Rector. Isaac was before me on the 17th December to answer for Love in a suit where he was plaintiff; he told me that Love requested him to appear and answer, as he was going on to the east ridge. This suit was on a note which was in my possession. Had other demands of Love's. Had his demand against Isaac, amounting to \$275, for which he had confessed judgments on oath, and the executions were issued. The judgments were entered on the 4th December and the executions then were given to Love; have never seen them since. I had also judgments against Israel. Had other demands of Love's—two notes against Hilliker, about \$5.25. Isaac called on me to get Love's money in the case against Smith. Issued an execution against Israel for Love, of from \$7 to \$9, which was paid up into about \$1. Jones, the constable, called on Israel for it; Isaac said he had Love's power to settle it, and directed Jones to endorse it satisfied. Love told me in presence of Isaac that he had execution against Nelson on which he wanted to sell, to avoid some subsequent executions

against him. Isaac was to bid in the property of Nelson and take the judgment of Love against Nelson, and the property was then to be instantly levied on as Isaac's, by those executions issued by me.

The *District Attorney* produced a power of attorney, purporting to be executed by John Love, empowering Isaac to collect, receive, settle and compound all demands due Love in Erie County, and to defend all suits against him; bearing date the 8th day of January, 1825.

Mr. Walden. The signature is not Love's handwriting. The name is not spelled right. The first time I saw that power, the name of Nelson was not on it as a witness.

Cross-examined. Am considerably acquainted with Love's handwriting, but am not much skilled in detecting forged hands. Love's writing is rather heavy—an old-fashioned hand.

S. G. Austin. Isaac called on me to draw this power, and it is my writing. They stated to me that they wanted a general power to transact all Love's business. That he was in some difficulty—was apprehensive of being arrested, and was secreted not far off, and had sent them to obtain the power, which would be taken to him for his signature. I told them it was unnecessary for Love to come to see me. I advised them not to have witness, as lawsuits might follow—to obtain that witness on every trial might be difficult; and if not witnessed, he might prove the power himself. They represented they could obtain his signature the next day. Have seen Love write

twice, and have his signatures in my office, which I have lately examined. The signature to this power does not resemble them much—I should not think it his.

Amos Smith. Love left a note with me for collection against Caleb Pierce. Isaac presented the power and demanded the money collected. Refused to pay over because I thought the power was incomplete, it not being witnessed. He afterwards presented it signed with Nelson's name as a witness to it. Then refused because I thought it forgery of Love's name. Love was a tolerable writer; he used often to be in my office writing on pieces of paper. He read well. The first time the power was presented to me, thought the signature was Nelson's writing—he sometimes writes well, sometimes not. Told Isaac that if Love was afraid of being arrested, he might call on me in the night and I would pay him. He replied, "My God, Love cannot do it; he is a damned sight farther off than people here have any idea of."

Benj. Dole. Saw Isaac the Saturday after Love was reported to be missing. He then had considerable money, a considerable roll of bills. He had been owing me for a year before this, and always complaining that he could not get money.

E. Torrey. Am a constable. I had an execution for Dole against Isaac, after he was put in goal; T. C. Love, Esq., sent the money to pay it up, as I understood. It was paid. Have examined the signature to the power and believe it not to be Love's writing. In the early part of January I told Isaac at my house, that it

was Love's object to add to his security, and that if he owed him he had better pay. He replied, "Give yourself no uneasiness, I have those executions in my pocket." He has told me that he had the sole control of Love's property. I arrested Isaac on this charge, on the 19th of February, and at that time I had Dole's execution. Told him that people supposed he had murdered Love, and that he had better find and produce him if he could. He said he could produce him, but if he could he would be damned if he would do it. He had paid me the taxes for his father, Israel and Nelson, in a town order of \$12 or \$12.50, payable to Aaron Benson. Love had told me that he had bought the order of Benson. Understood Love received it in that part payment of Benson's debt to him, on which I had the execution. Isaac told me he had Esquire Cary's note to Love, on which was due 20 bushels of wheat. There were notes to a considerable amount given to Love by Merriman, for some land. Isaac said he had these notes, and he intended to enforce the collection. On the examination of his father on the 19th or 20th of February, Isaac said on oath that he had seen Love and transacted business with him within two weeks. I think the Thayers were less embarrassed after the middle of December by executions than before that time.

B. Dole. When I saw the roll of bills in Israel's possession, saw Love's pocketbook, and think I sold it to him. Frequently saw him have it.

James Ives. Isaac had considerable money on the 10th Jan-

uary; he paid me two executions against Israel and Nelson, in all about \$17. He said he had money left—enough to pay all the debts they could bring against him and his brothers.

Orin Treat. Had an execution against Israel, in favor of James Ives, which I could not collect, but returned it unsatisfied. I found he had no visible property. Saw him in January, after I had returned the execution. He then said Ives had waited a good while, and should have his money.

N. Smith. Was at Ives' when his executions were paid up. Isaac told Ives he should pay up those executions, but if he trusted him any more, he might get his pay as he could.

John Twining. Saw Love last on 14th December. He came to me in my lot, about 80 rods from Nelson's. I told him I was going to Buffalo next day. I came down on the 15th of December and brought Love's order, dated the 14th, on Esquire Austin, for the money or an execution on his judgment against Bennett.

George B. Green. Came to Buffalo the night the body was found—went to the jail and told Isaac of it. First asked Isaac where Love was; he said in Canada. Said he saw him last on Saturday, 12th February—saw him down the Niagara river below Black Rock—that Nelson then went over the river and brought Love across; said he then paid Love \$17. That this was not the first time he had seen him since he went away; said he saw him first on the Big Tree road, in December last. Saw him again five or six miles beyond Williamsville, as he was riding

along he saw Love on the fence; that he then had business with him and paid him money; that Love lent Nelson some money to pay him a debt which he received that day; told him the body was found and where; he asked if I was there. I told him I was not, but that Smith had told me it was found. He said it was not so, for Love was in Canada, that he was alive and he had seen him down the river.

April 22.

Reuben Irish. On the night of 15th December, went to Washburn's. On my way down heard a gun fired, was going eastwardly to the coal pit then. Israel's was then east or northeast from me. The report was apparently behind me; cannot tell the time of night. The coal pit was, say, 10 or 12 rods from the house.

F. Jones. Had several executions against Israel in the fall and spoke to him about them. Had an execution of about \$1 against Israel, in favor of Love. He said Isaac would fix that. Isaac said Love ordered him to endorse it satisfied; and Nelson said Love directed Isaac to do so. After the prisoners were arrested I found a pocketbook at Nelson's, in a chest in the bedroom, containing \$300 or thereabouts of Love's demands. This book was found by me on the night of the examination of Israel and his father, the same day the body was found. The amount of the demands was about \$315. One note was payable in wheat; and some payable to Love, and some to bearer. Overheard Nelson telling about Love's going away. He said that Love had

cleared out—that there was a man came there, and said he was owing Love. That Love saw him and said he owed him nothing; and that if he did he would sue him at once. Isaac then cautioned Nelson as to what he was telling. Nelson said the man inquired for Love, and wished to pay him; but after seeing him, he said he was afraid he was after him for the forgery, and cleared out—avowing that that man owed him nothing. Knew Love well—he was a close man, and careful of his interest.

Aaron Le Clear. Was at Nelson's on the 16th January. Nelson and Isaac went upstairs to look for my note to Love. Could not find it, but Nelson said he had got it. That Love had gone away, and left his pocketbook and notes at his father's, that Isaac went and got them, and handed them over, as people called for them. Then agreed to pay to them my note by delivering wheat. My note not being produced in the time, I took away my wheat. On the 10th February, Isaac and Israel came to me and demanded the wheat; and upon my refusing, Isaac said that there would be a lawsuit—that he should send me to Buffalo. On the 14th February, received a letter from Mr. Campbell of Buffalo, stating that my note to Love was left with him for collection; and if paid by a certain day it would save costs. Paid no attention, however, to the letter, and have heard nothing of it since. Had known Love for about five years. He has lived with me. On New Year's day, I spoke to Isaac about my note; he said he had it, or believed he had. Heard of Love's having run

away for forgery, from Nelson, about the 15th January.

Cross-examined. Israel and Isaac came with a team to my house for wheat. Israel said it was indifferent to him whether they got the wheat or not; but it was Isaac's iust and honest due from Love. That I must pay the wheat to him, and settle with Love about the dishonesty of the note, of which I complained at the time.

Sylvester Irish. The night Israel's wife visited us, think I was up when Israel came for his wife. I have no recollection when the rifle was taken away from my house, nor whether taken away on the evening of killing hogs. Isaac has said that in all the shooting matches he had to be purser—foot the bills. I took it he meant the bills of the three brothers. This was after Love was missing.

H. M. Campbell. This winter received a demand to collect against Le Clear, and wrote the letter now produced. Am not confident whether Isaac left it. The note was in favor of Love, payable in wheat. Do not know Isaac. It is my impression that it was left by neither of these prisoners.

Adam Rector. Saw Israel on the day the body was found; he was 13 or 15 rods from the grave and coming in a direction from it. The body was found two and a half hours after this—he was going towards the sawmill and passed by S. Irish's—he was in the open field on his own land, not in any path. The place where the body was found was pretty much surrounded by sumac, briars and bushes.

Charles Howard. Saw all four

of the Thayers on Christmas at Arnold's, at a shooting match. Isaac had several bank bills. They came quite early, and shot a few times and Israel or Nelson told Isaac to give me a \$3 bill and let me keep my own account till they had shot out the money. He gave me a \$2 bill, and said he had money enough and was not afraid of his sixpences. Think he added that he had enough and that they cost him nothing.

Catharine Britton. Lived at Israel's a short time in November last; then stayed at Nelson's two or three days and then went home, which was about 1½ miles. Was at Israel's on the 6th of January and saw him there. I left there about the sun two hours high at night. Went from Israel's to R. Andrew's, then across to Irish's, as it was the nearest. Israel asked me to come back and stay at night, which I declined. He asked me which way I should go if I did not come back; I told him the path below the house—he replied that that path was bad and said I had better return by the way of his house. There were two paths, and which he meant, I do not know. I did not know then of the path leading by the grave. In going from Andrew's to Irish's, I might go by the grave by one path and not near it by the other. If I went back by Israel's to go to Irish's the path would not lead me by the grave; it went round it.

Esquire Daniel Swain. Examined Isaac and Nelson on the 19th and 21st. There was no inducements held out to Isaac on the examination, he was reluctant at first, but there was no threats nor promises used.

The examination of Isaac was read as follows:

Feb. 19. 1825.

Prisoner charged with murdering John Love, pleads not guilty, and saith the last time prisoner saw John Love in Boston was near the lower school house in Boston. Prisoner, Nelson and Love together, none others present; Love talked of his forging and other embarrassments, for which he expected to be pursued. Love then and there gave over all his obligations that were then due to prisoner, and called Nelson Thayer to witness the contract. Love then departed in haste; it was about sunrise in December last, but can't tell the day of the month—prisoner saw no other person, nor heard of any approaching or near them. Prisoner had never seen love but twice since; the first was some weeks thereafter, the last time was four or five weeks past, not less than four weeks—at both times prisoner saw Love in a field, nobody present nor near, had never seen Love in any house since he left Boston nor with any person, and further saith, he, prisoner, was gone two nights each time that he saw Love, that he went alone and returned alone both times.

The District Attorney offered to show what Isaac said on the examination of Israel, Sr., the father, on the 21st, upon which Isaac was sworn.

The Prisoner's Counsel object to the giving in evidence Isaac's testimony, as he was then under arrest and upon his own examination.

The COURT. The witness stated that he came forward voluntarily to testify; what he then says may be admitted. As to the objection to parol evidence of his testimony, the rule is that if the examination of the prisoner be reduced to writing, it will be evidence, and nothing, not in writing, can be heard; if not reduced to writing, parol evidence of it may be given. This being the testimony of Isaac, given on the examination of another person, does not come within the rule that makes an examination evidence, and therefore parol evidence only can be received, as to what he swore to or stated.

Mr. Swain. Isaac Thayer, on oath, said the last time he saw John Love in Boston, was from four to ten days after he parted with him at the school house, as related on witness' examination on the 19th inst. was with Love on the west hill, in witness' father's house, in the evening, and had seen him twice since, and no more; and further saith, when he parted with him at the school house, it was about sunrise, and Love handed him all his notes

and demands, and departed in haste as a man was approaching that Love heard was in pursuit of him—he did not have Love's pocketbook, but had the papers; and further saith, the other two times when he saw Love, was in the daytime—in a field both times. Had never seen him in a house, since he saw him at his father's, nor in company with any person. He went from home alone and returned alone, both times, and was gone two nights

both times, that he went to see him. The last time he saw Love was three or four weeks past, and knows he had not seen him within three weeks.

Mr. Washburn. Was present when Nelson's property was sold. Isaac bid the whole of it off—presumed it was bid in for Nelson—it went very low. Do not know the amount of the execution; think it was less than \$10. It consisted of one good sleigh, with steel shoes, 100 or 200 feet of siding, and four bushels of corn. Am well acquainted with Israel. He is illiterate—never saw him write.

Mr. Swain. The affidavit presented is signed by Isaac. It reads: "I swear by the ever-living God that I, Isaac Thayer, the undersigned, am John Love's lawful attorney, having received full power from said Love. Isaac Thayer. Sworn and subscribed to, this 10th day of January, 1825, before me, D. Swain, J. P."

Mrs. Sally Thayer. Recollect Isaac's leaving a red pocketbook at my house; he bought it. Saw him have it frequently, but it was after Love was missing. A pocketbook was found in the chest at my house, but not in Isaac's chest. Never heard any conversation between Isaac and Love about his managing Love's business. The book taken from the chest resembles the one here presented. Love had a large red, and a black pocketbook; this one taken from the chest is not either of them.

B. Dole. Think this pocketbook is the one Isaac bought of me, or like it. Sold him one of that size and description.

Laura Wilson. Recollect staying several nights at Nelson's last

December. Nelson was gone a good many nights.

Mr. Rector. Saw the body at the school house, and have no doubt it was Love's.

N. Smith. Knew Love when living—saw the body and great coat in the grave. I knew the scar on his forehead. He had said it was done with an Indian tomahawk. Discovered the same scar on the body.

Mr. Stafford. Knew Love well; was the first who found the grave. I knew the scar on the forehead, the pantaloons and great coat.

Thomas West. Knew Love—saw the body at the school house. Have no doubt it was him, though I knew of no marks on him. I perfectly knew the coat, and the handkerchief that was found round his neck. Heard the report of a gun in the direction of Israel's just before Christmas. Was then at Mr. Rector's. We thought Irish was cleaning his gun for Christmas. It must have been between 10 and 11 o'clock in the evening.

Daniel Pierce. This handkerchief is the same one that was taken off of the neck of the deceased.

B. Williams. Knew Love, but remember no marks on him. Saw all four of the Thayers on the 11th of January at Wilson's in Boston, at a shooting match. Isaac had then a number of bills, I should say 15 or 20. He paid the bill in the evening. Saw his pocketbook, it was about the size of this (the one in court). I saw them all there in the morning. The father paid the bill in the morning.

Aaron Benson. Knew Love. Saw him last on the 12th of De-

ember. I think he was going south. He had previously a judgment against me of \$27—I paid all but \$4 or \$5. I gave him Job Whipple's note, and a town order of \$12, payable to me. This was between the 1st and 10th of December.

Cross-examined. Before Love was missing, had heard reports of his forging in Pennsylvania. On the Monday after Nelson was arrested, conversed with Nelson and Isaac and advised them to produce Love, if he was to be found. Could get no satisfaction from them on the subject. Nelson said it would be impossible for any one to get him—he would fear such a person as E. Torrey. Offered to go myself, at my own expense, even if it was 300 miles; but they seemed to treat my advice and my offer lightly and with contempt or disdain, and I left them.

Dr. Ingalls. Israel was examined before me as a coroner. He was then under arrest for the murder. Before he testified he was told that he need not say anything that could criminate himself. Israel testified then that he saw Love last on the 16th day of December, the day after he killed hogs; saw him at Nelson's barn. That on the evening he cut up his hogs Love came up to his house with him. That he had previously a good many notes and supposed he had considerable money. That when he saw him last he had no great coat on.

B. Curtiss, Jr. Live south of Israel's, on the west side of the road, and was probably at or about home about the middle of December. Had a gun, but there was no other about there. Have

no recollection of its being fired by anyone. It was not by me. About the 10th of January, Isaac had about \$20 paid to him by Twining. Mr. Torrey called to collect the taxes. Isaac asked him how much the taxes of all the Thayers were. Israel was previously embarrassed pecuniarily. Knew little of Isaac; he had not, however, much money.

Cross-examined. Understood Isaac went to the East last summer to get money. Am a carpenter and joiner. In my shop I sometimes wrought late, and sometimes went to bed early. Saw Daniel Pierce carrying home the hog's pluck, and I think I was at the house that night, but do not know whether I was or not.

S. G. Austin. Delivered Love's execution against Bennett to Mr. Twining on the 15th December on the order of Love.

B. Dole. Saw Love last in the fore part of December; he then had considerable money. Borrowed \$5 of him for a few hours and paid him by a \$10 bill, which he put into one side of his pocketbook, with some, more than two, other \$10 bills, and took a \$5 out of the other side and paid me. He had several fives.

Samuel Hambleton. In the fore part of February, Isaac had some money at my house. He was about purchasing a harness and was to pay for it in grain. Saw a \$2 bill, and he said he had a five—he said he could pay me for the harness in cash. He told me he had bought a rifle, and that a few days before he had paid \$25 for it.

Wilder Rice. Saw Isaac have some money the day after Christmas; do not know how much, but he exhibited a bundle of

bills; he said he had just sold the colt at Buffalo. Saw him have money at no other time.

N. D. Rector. Israel was somewhat embarrassed previous to December. He came to me and inquired what articles were exempt from execution, and stated he had executions against him. Was at his house and observed some things were missing that I had seen there before; I believe he intended to secrete what was not exempt.

A. C. Fox testifies to the schedule of the demands found in the red pocketbook in the chest at Nelson's.

George B. Green. In the fore part of January last, I had a warrant against Isaac, in favor of White, or White & Swift. When I arrested him, he said they were mistaken in the man—that he had bags of money, enough to buy out White, or the whole of them. He afterwards paid out a \$10 bill to George White, and I saw he had two more left.

Cross-examined. Thought it was bragging at the time.

Samuel Bennett. Love had an execution against my son. I

went to Boston on business—saw old Mr. Thayer and Isaac at the sawmill. The old man told me he did not know where Love was, but he saw him the evening before going across the bridge. The conversation was in presence of Isaac. He did not know but Love might be at his house. He said he was a strange man, and he could not tell where he went to. Went to his house, about four miles—Love was not there; came back and met the old man and Isaac about half way. Old man then said he thought Love had gone to Batavia. Some one of them said Love was not at Esquire Rector's, as they had just come from there. I told them that I had some money to pay him; he replied, I might leave it with him or them; or Love would probably be over in a few days and see me.

Cross-examined. Had seen Isaac before, but did not know Israel or Nelson. Had seen the father; he had paid me a military fine. I cannot say that they all heard our conversation, but they all stood round near together.

THE DEFENSE.

Mr. Love. Gentlemen of the Jury: The embarrassment under which I rise to address you, on the subject of this defense, is beyond the power of language to express.

On the one hand is a rigorous prosecution for the most damning of all offenses, conducted by an able, industrious and persevering prosecuting attorney, assisted by two associate counsel of distinguished ability, and great professional skill; and on the other hand, the lives of two fellow beings, in some measure committed to my charge, and staked upon the result of the issue I am called upon to defend.

May I not with propriety express myself in the language of inspiration and ask, "Who is sufficient for these things?"

I have not infrequently addressed a jury of my country from this place, on subjects involving the pecuniary interest, character and in some instances, the personal liberty of an anxious and confiding client; but it is the first time it has ever occurred in the course of my professional pursuits, that the life of my client depended upon the verdict to be taken.

In aid of this prosecution, the honest prejudices and prepossessions of the whole community, in which the crime charged against the prisoners at the bar was perpetrated, have been strongly enlisted; and each individual in order has been called upon the stand, with his recollection scourged and his memory quickened by the ingenuity of counsel, until he has been enabled to detail in the minutest manner, every suspicious act and thoughtless expression that have escaped these unfortunate men during the whole course of their eventful lives; and in each word, thought and deed these witnesses are made, clearly to discover, an index, as legible as the handwriting upon the wall, pointing to the prisoners as the murders of John Love.

That so bloody a deed, as the one portrayed by the learned counsel for the prosecution, at the commencement of this trial, and which, it will not be denied, his proof has fully established, should create sympathy and produce excitement, is creditable to the moral character and humane feelings of the citizens of Boston. God forbid that my lot should ever be cast upon a community so dead to the feelings of humanity, or so accustomed to the scenes of human butchery, as could remain passive and unmoved, amid such slaughter as has been disclosed in the evidence. No, gentlemen, the possession of our property, the preservation of our character, the enjoyment of our liberty, and even life itself, must always depend, in a greater or less degree, upon the notions and opinions, which the community in which we are located entertain of personal rights; and in proportion to the correctness of their estimate, will the honest indignation of that

community pursue the hardened villain who attempts their violation.

That John Love was most brutally mangled, butchered and murdered, at or about Boston, in this county, some time during the course of the last winter, through human agency, we shall not attempt a denial; the proof already adduced fully establishes that fact, as also that the body found on the 23rd of February last, was the body of the deceased.

But, gentlemen, while we freely indulge the most laudable feelings of our nature, which the mangled and lacerated body of the unfortunate Love is well calculated to inspire, let me caution you against substituting that sympathy, in the place of proof, for the purpose of fixing that murder upon the prisoners at the bar.

Does their case find no sympathy in your benevolent bosoms? Was a more solemn and interesting occurrence ever before presented to the consideration of a jury? A father and three sons, including a whole family, put upon their trial for the most aggravated of all offenses, and if convicted, the consequences of that conviction is to obliterate the recollection of their existence, leaving not even a name behind. But with this you have no more to do, as jurors, than with the cut and mangled remains of John Love; the question submitted to your consideration, and which you are called upon to determine is, whether the prisoners at the bar were, or were not, the perpetrators of that horrid deed.

This fact you are to decide and determine, upon the legal evidence to be produced on this trial; and not upon the conjectures and suspicions of witnesses that have been called before you to testify, nor upon any opinions you may have formed by hearing the fatal story a thousand times repeated, before you took your oaths and your seats, as jurors in this cause.

A correct definition of the crime charged in this indictment has been given by the prosecutor, in his opening remarks; and the different species of homicide have been by him correctly stated and defined—and as was premised by him, no question will arise, in the progress of this trial, whether the

killing charged is murder or manslaughter. It is conceded by the prisoners' counsel, that if the killing, in this case, is fixed by the proof upon the prisoners at the bar, it is murder. I shall therefore pass to the nature of the testimony upon which this prosecution is attempted to be sustained, and read to you from the books something on the subject of circumstantial testimony and the rules by which it is to be applied.

If, gentlemen, it is better that ten guilty men should escape than that one innocent man should suffer, agreeable to the long established and well settled maxim in the history of criminal jurisprudence, it will not be denied that in a case where three or four persons are suspected of an offense, in which all are not necessarily inculpated, and from the nature of the testimony, a difficulty should arise in fixing with legal certainty the offense upon the actual offender, it is better that all be acquitted, than that the innocent should suffer with the guilty. This just, humane and benevolent doctrine is sufficiently illustrated in the cases that have been read to you.

Again, gentlemen, I shall assume another position in sustaining this defense, and if I succeed in satisfying you of its correctness, I trust you will hear and apply the evidence in this cause, agreeably to the doctrine it inculcates.

The position is this: It is better that a guilty man escape the punishment due to his crimes, than that he should be convicted of an offense upon incompetent proof. The end does not always justify the means—in a system of laws for the regulation of society, where every offense is clearly delineated, and its punishment distinctly known, the rules of evidence and mode of proof in determining upon the guilt or innocence of the accused, forms the most important part of those laws, and is to be as strictly regarded by all courts and juries, as the law that defines the offense, and prescribes the punishment. And it is more dangerous to the rights of individuals, to vary the well known and long established rules of evidence, with a view to meet a particular case, than it would be to suspend the operation of a statute, to favor or

oppress a particular citizen. And as it regards the security of society, it matters not, whether the suspension or variation of the known rule is to convict the midnight assassin, or oppress the unoffending child of misfortune, wretchedness and want. For, let it be remembered that if courts and jurors should quietly suffer the salutary rules of evidence to be violated, in their mistaken zeal to punish a supposed offender, the only legal refuge of conscious and unsuspecting innocence is invaded, and the lives and liberties of our citizens become subject to the whim and caprice of a corrupt and profligate Judge. This doctrine, gentlemen, if correct, I desire you should bear in mind, while the testimony is unfolding before you, as well as in your final deliberations upon the fate of the prisoners.

The testimony on the part of the accused will not detain you a great while; it was impossible for the prisoners, or their counsel, to anticipate one of the thousand circumstances that have been given in evidence on this trial, to establish their guilt. They are necessarily unprepared to give the explanation in many cases, where it might have been very easy for them to do so. I will barely mention one circumstance on which I discover much stress is laid by the prosecution to inculcate Israel Thayer, Jr., in this business, and where he must necessarily be taken by surprise, and wholly unable to explain the circumstance, although an explanation the most satisfactory might have been given, had he been advised that such an occurrence would have been urged as an evidence of his guilt. It is this: It was proved by Mr. Ives that Isaac paid him a judgment he had against Israel, Jr., of about \$8. This is adduced to show that Israel, Jr., shared in the spoils of which John Love was rifled; first presuming that the money paid was money obtained by the murder of John Love. Now, although this prisoner, Israel Thayer, Jr., might have sold his last cow to obtain this money, and have sent the proceeds of that sale by his brother Isaac to satisfy the claims of this honest creditor, how, I ask, is the prisoner to prove that fact, without the least knowledge that it could become material; and tried as he is, at a distance of at least

twenty miles from where the transaction happened and where the purchaser of his cow, at this moment resides? I give this one instance, gentlemen, of the difficulty attending a satisfactory explanation being given by the prisoners at the bar, of every circumstance that has been detailed in the evidence, even in simple cases, and where they are susceptible of explanation the most satisfactory, and hope you will judge leniently, and in no case construe so simple an occurrence into a presumption of guilt, merely because no explanatory proof has been given, where your own reflection can easily account for the absence of such proof.

I shall now close these remarks, gentlemen, by charging you upon the solemnity of the oath you have taken, so to divest yourselves of prejudice and conjectures, which the often repeated story of murder and barbarity necessarily engenders, as that when you shall meet the prisoners at the bar, on the confines of eternity and in the assembly of a congregated world; where neither mystery, suspicion, or doubt can exist in relation to the transactions of mortals, that there in the awful presence of your God, and of their God, yours will be the felicity of knowing that you heard the testimony in this case with an impartial ear, and found your verdict upon the evidence given on the trial.

THE TESTIMONY FOR THE PRISONERS.

Drs. J. Trowbridge and H. Rutgers Stagg testified that the time of the decomposition of human bodies, and the decay of animal matter, depended most essentially upon the attendant circumstances; that there was no rule by which to determine from the state of decay or putrefaction, how long the body had been deprived of life. That a man in good health, dying without loss of blood, would decay sooner than a person out of health and emaciated. That some degree of

heat and moisture was requisite to facilitate the operation of decomposition; that the time must always depend on circumstances, the state of health at the time of death, habits of body, time and place of burial, the state of the atmosphere if the grave was so shallow as to allow that to affect the subject. In the case of Love, it would appear that some of the principal arteries were separated, and consequently almost all his blood must have been lost; and he was so slightly buried that probably the

frost penetrated the body, both of which circumstances must have delayed the decay and decomposition of the body.

Sylvester Irish. Do not know as Israel was the owner of the gun last December; have sometimes known of his having a gun, and sometimes he borrowed. He told me last summer that he lent Isaac \$4 to go to the East with. Israel and his wife came to make the visit spoken of about dark and he went very soon back again. During the time he stayed we had our ordinary common conversation; he spoke of his hogs and their weight.

Sally Thayer. When Isaac and Nelson came home from Christmas shooting, Isaac told me that Nelson had been obliged to sell him his clothes to pay for his shooting.

W. S. Littlefield. Had some acquaintance with Love; saw him last in December at Nelson's.

Mr. Love. Did he tell you he was afraid of being arrested for forgery?

(The Counsel for the People objected.)

Mr. Love. As there has been an attempt to show that the prisoners originated such a report, we wish to rebut all such presumption by showing Love's confessions long before he was missing.

The COURT. This evidence cannot be received. It is proved that such a report was in circulation before Love was missing. We have not admitted such testimony on the other side.

William Thompson. Was at the mill when Bennett came and

inquired for Love. Do not recollect that either of the three boys was there. The old man and some other persons were present. The old man said he believed Love went the evening before to his house.

Z. Skinner. Saw Isaac give his notes, two notes, for a rifle to Ogden, of whom he bought it. He had a rifle of his own before that, for, say, a year. Did not know or hear of his having any other.

Mr. West. The grave was about 14 or 16 inches deep and a little rising of four feet long. The dirt on the body was about six or eight inches deep.

Mr. Sprague. Love's body lay bent down in the middle, and at that point the dirt was about 12 inches deep; the feet and head up a little, the feet pressed against the foot of the grave. The dirt had been frozen down to the body. It was close to the log on the southeast side. Think the bushes shaded the grave-stone.

Mr. Jones. If Israel had a gun I think I should have seen it in searching in his house for property to levy upon.

Daniel Pierce. Israel had no gun; he once brought one from his father's, but I do not recollect the time. He set it up by the side of the house, but I do not recollect whether it was before or after we killed hogs.

N. Smith. Saw Love's colt at B. Fowler's grocery, in Buffalo, a few days after it was sold to him. Fowler told me he had just bought it. It was the same colt that Love owned.

MR. SMITH, FOR THE PEOPLE.^a

Mr. Smith. Gentlemen: I rise to address you on this occasion, under a peculiar sense of inability, to do justice to a cause of such magnitude. After an incessant and laborious investigation of two days, I find myself too far exhausted to enter upon the discussion of a cause embracing such a vast variety of circumstances, and involving interests so deep and so vital. I feel conscious that in attempting to perform the part, which falls to my lot in this matter, I must fall far short of what the public have a right to expect, and what my duty seems to require. But relying on your candor and your indulgence, I shall proceed to reply to the able and eloquent arguments which have been offered on the part of the prisoners, and to which I must acknowledge I have listened with equal pleasure and respect. And while I attempt to lay before you the nature and merits of this prosecution on the part of the People, and to illustrate those principles of law and rules of evidence, which I consider as applicable to this case, and which are usually made to govern such a state of facts as are before you, may I be permitted to hope that I shall be able in some measure to facilitate your inquiries, that my efforts, feeble as they may be, will afford you some little aid in performing the arduous, painful, and solemn duty that devolves upon you. The station which you occupy today is the most exalted and awfully responsible of any in which you ever have been, or can be placed. The duty you have to perform is thrown upon you by your relative situation as members of society; and although it be laborious and painful, yet the consolation you will derive from a faithful discharge of that duty will, I trust, yield you an ample reward. Such has hitherto been the state of society, in this highly favored country, that our courts have rarely had to

^a *Mr. Griffin* and *Mr. Allen*, for the defense, and *Mr. Brown*, for the People, addressed the Jury at length, but "as these gentlemen," the old report says, "left town immediately after the trial, we were unable to get correct reports of their speeches."

sit in judgment upon crimes of so foul a nature as the one detailed before you; and it is to be hoped that the day is not distant when another transaction like this shall occur to disturb the public peace, to agitate and shock the public feeling. But it is to be feared that the age in which we live is becoming more and more corrupt; that the perpetration of crimes is becoming more and more frequent. If this be so, it adds much to the responsibility of those who are intrusted with the administration of public justice, and the preservation of public peace. Everything that we possess, or consider as worth possessing, in this life, depends essentially upon the purity, vigilance, and firmness of our courts and our juries. They are the guardians of society. It is to them that we look for protection against all those overwhelming evils that flow from human depravity; and without their protection our very lives are insecure. You cannot, therefore, fail of being deeply penetrated with a sense of the importance of the trust confided to you, and I will not doubt but that trust will be, by you, faithfully and conscientiously executed. If, unfortunately, you had imbibed prepossessions, respecting this transaction, it will be your duty to discard them, so far at least, as the frailty of human nature will admit. The remarks of the counsel for the prisoners on this point are highly worthy of your consideration. And do not, I entreat you, gentlemen, consider this caution as a censure upon you; for prejudice is incident to all human nature. No man can boast an exemption from it. And the little experience I have had in courts of justice has taught me that prejudice, particularly on the minds of a jury, is a most formidable foe to the administration of public justice. It exerts an insidious and powerful influence; and the mind the most under its bias is often the least conscious of its power. We wish you to try this cause, gentlemen, upon the naked facts that have been laid before you, since you entered that box; and if these facts, alone and independent of all other considerations, are not sufficient to convince you, beyond a rational doubt, of the prisoners' guilt, we entreat you to acquit them. But if these facts and circumstances are suffi-

cient to satisfy you, beyond a reasonable doubt, that they did commit the crime with which they are charged, it will be your imperious duty to pronounce them guilty.

The prisoners at the bar, as you have already heard, together with two others, are indicted for the murder of John Love. With the charges against Israel Thayer, Sr., and Nelson Thayer you have nothing to do. Your inquiries are to be confined to Isaac Thayer and Israel Thayer, Jr., and them only; and the grand question for your consideration will be, Were they, in any manner, engaged or concerned in the murder of John Love? For it is perfectly immaterial who gave the fatal blow; whether they, or any other person, known or unknown, provided they were actually present, aiding and assisting, when the blow was given; for in that case the law makes the blow of one the blow of all; and all who are present, aiding and assisting, when a murder is committed, are equally guilty.

The fact that there has been a murder committed, and which is necessarily made the foundation of all prosecutions of this sort, is established by the most unequivocal testimony, and is in fact, conceded by the counsel for the prisoners. It will therefore be unnecessary for me to read you the law defining the crime, or showing the distinctions between murder and the other kinds of homicide.

The murder of John Love being established, to fix the crime upon the prisoners at the bar, we have recourse to a train of circumstances disclosed in the testimony. But here we are met, by the counsel for the prisoners, with an objection to this species of testimony.

The learned counsel have strenuously contended against relying on presumptive evidence in capital cases; and to show you the danger of resting a conviction on circumstantial testimony, they have read several cases from the appendix to Phillip's Treatise on Evidence. But, gentlemen, before you yield too far to their persuasions in this particular, I trust you will pause and reflect, for a moment, on the danger of rejecting this species of testimony. The essay on circumstantial evidence, contained in the appendix to Phillips' Evi-

dence, from which the counsel for the accused have read several extracts, is not the law of the land. It has never been adopted by this or any other country; and to show that it is scouted by the courts of this State, I will read you a case from one of our own reports.^b The principles of presumptive evidence, as recognized by the courts of this country, is not a novel doctrine. It is a doctrine cœval with civil society. It has been matured by the wisdom and experience of ages; by men of the greatest learning and acquirements; by judges whose lives were an ornament to the age and country in which they lived, and whose names will be remembered, so long as time shall last, or virtue and wisdom be considered praiseworthy among mankind. This doctrine, thus matured and perfected, has been incorporated into, and become a part of, the law of this country. It is too salutary, and too firmly established, to be assailed with success at this day. It cannot be overthrown, and it is well that it cannot. To explode it, would be to prostrate the barriers of personal security, and uproot the very foundations of civil society. High crimes are generally perpetrated with secrecy and caution, usually in the dead of night, as in this case, when the world is wrapped in silence and sleep, when darkness covers the wretch and his deeds from every mortal eye. To require the testimony of eye witnesses to convict in such cases, would be to give all felons full license to extend their ravages at will, to prowl upon the community, undetected and unrestrained.

Let us for a moment attend to the inducements which the prisoners had to the perpetration of this crime. Men do not act without a motive, says one of the learned counsel for the accused. Let us see if they had a motive in this case. It appears that Isaac Thayer, one of the prisoners, had confessed judgments to John Love, the deceased, to the amount of \$275. This debt had been contracted by the three brothers, whose property had been shifted into Isaac's hands, for the very purpose of securing that debt. Executions had been taken out, and the property of the three brothers was liable to be

^b *Mr. Smith* here cited the trial of *How*, 6 Am. St. Tr.

sold, whenever Love should direct; and as they had no means of discharging that debt, they had no way to save their property from being sacrificed, but to make way with John Love. It is known, too, that Love had about him considerable money, and other property.

In approaching the evidence in this case, the first prominent fact that strikes our attention, is the circumstance of Love being seen in company with the accused, on the evening of the 15th of December (which was the last time he was seen living), and starting with the accused from the house of Nelson Thayer, to go to the house of Israel Thayer, Jr., for the avowed purpose of staying all night. This fact is established by the testimony of four witnesses. Isaac Thayer, in his examination before the magistrate, admits that Love was at the house of Israel, on that night; and this is the last that is ever heard of Love, until his mangled body is taken from a shallow grave, not thirty rods from that fatal spot. This single fact, unexplained as it is, raises a violent presumption of guilt against the accused. The next remarkable circumstance is the report of a gun, heard on the same evening of the 15th of December at or near the house of Israel Thayer. This fact is proved by a great number of witnesses; and although they do not agree as to the time of night, which was, indeed, not to be expected, yet there can be no doubt of the fact. It may be well here to attend to some evidences of preconcert, by which it will appear most obvious, that this murder was the result of arrangement and premeditation. Sylvester Irish says that about the 15th of December, he does not exactly remember the day, Isaac brought a rifle to witness' house, under a pretense of getting it cut over; and although he was told that the rifle could not be cut, he still left it standing behind the door. This house is only forty rods from Israel Thayer's. In the afternoon of the 15th of December, the day preceding the murder, the boy living at Israel's is sent home to his father's to stay all night; and in the evening the wife of Israel is conducted over to Irish's for an evening's visit. On her arriving at Irish's, she finds Isaac there. Her husband immediately goes back, and soon after Isaac goes out, and

does not return for some time. These seem to have been the arrangements; and this particular time chosen, because Israel had been killing hogs that day, and blood would necessarily be scattered about the house. These facts appear to be too plain to be misunderstood. The bringing of Israel's wife to the house of Irish seems to have been the signal for Isaac, who was there waiting, to seize the rifle, previously concealed at the same house, and repair to the house of Israel, and commence the horrid work; which he undoubtedly did, by shooting in at the window, whilst the other two brothers were in the house with Love, ready to give the finishing blow.

This conclusion is rendered the more probable, from the appearance of the body of the deceased when found. The body was found with a ball hole through the head; the skull fractured on the back part; one side of the face cleft off, apparently with an axe; and a deadly wound across the throat, severing the breath pipe; from which it is evident that two or three persons must have taken each a part in the horrid transaction. Here, gentlemen, I might rest this cause; satisfied that these facts would be sufficient to warrant you in pronouncing the prisoners guilty. But there are other circumstances which must not be omitted; one of the most remarkable of which is, the transfer of Love's property from his possession to that of the Thayers. No sooner is Love missing than the prisoners become suddenly and unaccountably in possession of Love's property, even the very horse on which he rode to the place of his death is found on the same spot, in the stable of Israel Thayer, who claims it as his own. Nor are the means by which they got possession of some of this property unworthy of your consideration. They forged orders and a general power of attorney, authorizing Isaac Thayer to collect all John Love's debts. This power of attorney they produced in courts of justice, and proved it genuine by their own oaths, when necessary. One of these forged orders from John Love bears date on the 16th of December, the very day after he was murdered. So that the body of the deceased was hardly cold beneath the turf, before they

were ransacking the neighborhood, in search of his property; and eagerly grasping their blood-stained fingers on all they could find. From a state of poverty and distress, harassed by constables, and unable to satisfy their importunities, the prisoners became suddenly clear of debt and flush with money; and even those very executions which Love had a few days before taken out against them, are found in their own pockets. (Here *Mr. Smith* made a review of the testimony showing the amount of property belonging to John Love which they had obtained, and recapitulated the various and inconsistent statements which they had made respecting the absence of Love, and then proceeded.) These, gentlemen, are the facts on which we rely to establish the prisoners' guilt. These are the facts which one of the learned counsel says are "trifles light as air," but which we say "are proofs as strong as holy writ." With such an uninterrupted concatenation of circumstances—such a train of guilt-proclaiming facts before us, all tending to the same point, all conspiring to establish the same awful truth, who will take it upon him to decry the power of circumstantial testimony or say that it is not equal to positive proof?

The murder of John Love was one of peculiar atrocity. The corruptest ages of the world hardly furnish its parallel. It was committed under the most aggravating circumstances, and without excuse or palliation. Love was the friend of his murderers. He had lent them money, and shown them many favors; and on that fatal night which proved his last they decoy him to one of their houses, as a friend and a guest; and there butcher him, in cold blood, as they had done their swine the day before! They then rifle his pockets, and proceed to purloin all his effects, to be found in the neighborhood; adding robbery and theft to the crime of murder. Nor does their career of iniquity end here. Ascertaining that he had money in the hands of other persons, they proceed to collect those moneys by means of forged papers, and protect themselves by swearing, in the name and presence of that God whose laws they thus violated, that those papers were genuine. What a dismal catalogue of crimes do we here

· behold! Murder, robbery, theft, forgery and finally perjury; all committed, in the course of a few days, by the same persons, and to attain the same object; namely, the acquisition of a few hundred dollars in money and property. If there be any part of this transaction more strange and unnatural than the rest, it is the hardness of heart, the blindness of mind, and the perverseness of soul, which characterized these men, in their mad, unhallowed career. It is rare that the perpetrators of high crimes, appear so perfectly steeled against all the compunctions of conscience. The murderer is usually supported, until he has actually done the fatal deed. But when he has given the deadly blow, and sees the victim of his malice fall and gasp beneath his feet, his courage fails him, and he relents. He begins to reflect on the enormity of his crime; and guilt and remorse, with all their soul-tormenting horror, seize upon him; thrill through every nerve, and pierce his heart with unsupportable anguish. He flees from society, and shuns the face of man. He hears, or thinks he hears, from frowning Heaven, the awful reproof, "What is this that thou hast done? The voice of thy brother's blood cries to me from the ground!" But the murderers of Love seem to have been beyond the reach of those feelings. They seem to have stifled every emotion of the heart calculated to arrest them, in their wild and fatal career. Without stopping to hear the friendly admonitions of that monitor within the breast, they rushed heedlessly on, from crime to crime, until they had reached a most awful and appalling climax of guilt.

Gentlemen, as I am to be followed by other counsel, I am not disposed to detain you longer. I have endeavored to discharge my duty in this matter, in such a manner as to satisfy my conscience. And if I have evinced more zeal than may be thought compatible with the accusing side of this prosecution, I earnestly ask, that it may be ascribed to a habit of speaking, and a sense of duty, rather than any improper motive, or want of feeling towards the accused. For had I been at liberty to indulge my sympathies, towards the accused, I could have wept over their misfortune and fate.

But I was not at liberty to do so. The public good is, and ought to be, an object paramount to every other consideration.

When we see the very neighborhood in which we live infested with crimes, at which humanity recoils, we ought to feel alarmed; and every citizen who participates in the benefits of the social compact ought to feel willing to see the offenders brought to justice; and to perform such parts as the laws of his country may assign him, with firmness and fidelity. Should such offenses escape detection and punishment, the most alarming consequences might well be apprehended. Encouraged by the imbecility and imperfection of human laws, the felon would crawl from his hiding place, and extend his depredations far and wide. A few dollars about the person of the citizen would only expose him to the rude and blood-stained hands of the assassin and the cut-throat. Society would lose all its endearments, and become a prey to fear, alarm, distrust and crime.

THE VERDICT.

The *Jury* retired about 11 o'clock in the evening after an elaborate and solemn charge from JUDGE WALWORTH, and in about half an hour returned a verdict of *guilty* against both the prisoners.

THE TRIAL OF NELSON THAYER.

April 23.

This morning, at 8 o'clock, commenced the trial of *Nelson Thayer*, on a separate indictment, for the same murder. The evidence on this trial was substantially the same as on that of Isaac and Israel. This cause was summed up on the part of the prisoners, by *Mr. Love* and *Mr. Griffin*, and on the part of the People by *Mr. Potter*. The *Jury* retired about 11 o'clock in the evening, after receiving a charge from the COURT, and in a few minutes returned a verdict of *guilty*.

THE SENTENCES.

April 25.

At 10 o'clock today the *prisoners* were brought to the bar to receive the sentence of the law.

JUDGE WALWORTH. Nelson Thayer, Israel Thayer, Jr., and Isaac Thayer: You have been indicted by the Grand Jury of this county for the murder of John Love, at the town of Boston, on the 15th of December last. You have respectively had fair and impartial trials, in which you have been aided by faithful and intelligent counsel. After a deliberate and patient investigation of your several cases, by Petit Juries, they have been constrained and compelled by their consciences and their oaths, to pronounce each and all of you guilty of a most foul and aggravated murder. Have you, or either of you, anything to say why the sentence of the law should not be pronounced against you, in pursuance of your conviction for this offense?

The feelings and emotions with which I enter upon the discharge of the solemn and important duty which devolves upon the Court, and which I am now about to perform, are too painful to be expressed. To pronounce the dreadful sentence which is to cut a fellow mortal off from society, to deprive him of existence, and to send him to the bar of his Creator and his God, where his everlasting destiny must be fixed for eternity, is at all times, and under any circumstances, painful to the Court. But to be compelled, at one and the same time, to consign to the gallows three young men who have just arrived at manhood, standing in the relation to each other of brothers, and connected with society in the tender relations of children, brothers, husbands and fathers, presses upon my feelings with a weight which I can neither resist nor express.

If in the discharge of this most painful duty that can ever devolve on any Court, I should in portraying the horrid circumstances of this case, make use of strong language to express the enormity of your guilt, and the deep depravity which it indicates, I wish you to rest assured it is not with any intention of wounding the feelings of your relatives, or for the purpose of adding one pang to your own afflictions, while the righteous hand of an offended God is pressing so heavily upon you. But it will be for the purpose, if possible, to awaken you to a proper sense of your awful situation, and to prepare you to meet the certain and ignominious death which shortly awaits you. It is to endeavor if possible to soften your hearts to produce a reformation in your feelings; that by contrition and repentance you may be enabled to shun a punishment infinitely more dreadful than any that can be inflicted by human laws—the eternal and irretrievable ruin of your guilty souls.

From the testimony which was given on the trials of your several cases, there is no room to doubt the certainty of your guilt, or the aggravated circumstances attending the perpetration of the bloody

deed. The man whom you have murdered was your companion and friend. He had loaned you money to relieve your necessities, and to support your families. He was the lenient creditor, renewing and exchanging his judgments and his executions from time to time to prevent the sacrifice of your property. He was the lodger of your father, and frequently enjoying the hospitalities of your own roofs. In the unsuspecting hour of private confidence, you decoyed him to the retired dwelling of Israel Thayer, Jr., and there, while he was enjoying the hospitality of the social fireside, you stole upon him unperceived—you aimed the deadly rifle at his head, and with the fatal axe you mangled and murdered your victim, mingling his blood with that of your butchered swine. But your guilt and depravity did not stop here. Scarcely had you committed his lifeless corpse to its shallow grave, before you began to collect and riot upon the spoils of his property. To the crime of murder you added those of theft, fraud and forgery, and repeatedly imprecated the vengeance of Heaven upon your perjured souls.

The punishment of death has been denounced against the crime of murder, not only by the laws of all civilized nations, but also by that law which was written by the pen of inspiration, under the dictation of the unerring wisdom of the Most High. And as God Himself has prescribed the righteous penalty for this offense, so there is strong reason to believe that very few murders are committed which are not ultimately discovered, and the wicked perpetrators thereof brought to merited punishment.

Wretched and deluded men! In vain was the foul deed perpetrated under cover of the darkness of the night; in vain was the mangled body of your murdered companion committed to the earth, and the lonely grave concealed by rubbish; in vain was the little boy sent home to his mother, and the unsuspecting wife removed from her house, that no human eye should be near to witness the foul and unnatural murder; in vain did you expect the snows of winter to conceal the grave, until the body of your victim could be no longer known and recognized. You forgot that the eye of your God was fixed upon you. The eye of God, who suffers not even a sparrow to fall without his notice. You forgot that you was in the presence of Him to whom the light of day and the darkness of midnight are the same: that He witnessed all your movements; that He could withhold the accustomed snows from falling on the earth, or His breath could melt them when fallen, leaving the grave uncovered and thus exposing you to detection and condemnation. His vengeance has at length overtaken you. The sword of human justice trembles over you, and is about to fall upon your guilty heads; you are about to take your final leave of this world, and to enter upon the untried retributions of a never-ending eternity. And I beg of you not to delude yourselves with vain hopes of pardon, which never can be realized. Your destiny for this world is fixed, and your fate is inevitable. Let me, therefore, entreat you, individually and collectively, by every motive, temporal and eternal, to reflect upon your present situation, and the certain death that shortly awaits you. There is but one who can pardon your offenses;

there is a Savior whose blood is sufficient to wash from your souls the guilty stains, even of a thousand murders. Let me, therefore, entreat you to fly to Him for that mercy and that pardon which you must not expect from mortals.

When you shall have returned to the solitude of your prison, where you will be permitted to remain for a few short weeks, let me entreat you by all that is still dear to you in time—by all that is dreadful in the retributions of eternity—that you seriously reflect upon your present situation, and upon the conduct of your past lives. Bring to your minds all the aggravated horrors of that dreadful night, when the soul of the murdered Love was sent unprepared into the presence of its God, where you must shortly meet it as an accusing spirit against you. Bring to your recollections the mortal struggles and dying groans of your murdered friend. Recollect the horror which seized you, while you dragged the mangled remains to the place of concealment. Think of the situation of your aged father, to whom you are indebted for your existence. Think of the grief of your distracted and disconsolate mother, who has nursed you in the lap of affection, and watched over the tender years of your infancy; who must now go down to the grave sorrowing over the ruins of her family. Think of the dreadful agonies, think of the unnatural and desolate widowhood to which you have reduced the unfortunate partners of your beds and of your bosoms. Think upon the situation of your poor orphan children, on whom you have entailed everlasting disgrace and infamy, and who are now to be left fatherless and unprotected to the mercy of the world. And when by such reflections as these your hard and obdurate hearts shall become softened, let me again entreat you, before your blood-stained hands are raised before the judgment seat of Christ, that you fly for mercy to the arms of a Savior and endeavor to seize upon the salvation of His cross.

Listen now to the dreadful sentence of the law; and then farewell forever, until the Court and you, with all this assembled audience, shall meet together in the general resurrection.

You and each of you are to be taken from hence to the prison from whence you came, and from thence to the place of execution, and there, on the 17th day of June next, between the hours of 12 at noon and 2 o'clock in the afternoon, you are to be hanged by the neck until you are dead.

And may that God, whose laws you have broken, and before whose dread tribunal you must then appear, have mercy on your souls!

THE CONFESSION.

Soon afterwards, the three brothers made a full confession of the murder of John Love, to U. Torrey, the under Sheriff, in presence of witnesses, as follows:

They had contemplated the murder of John Love for four or five weeks, and it was concluded at length, that the deed should be per-

petrated on the 15th of December. That the boy, D. Pierce, on that night should be sent home, and the wife of Israel induced to make her visit, as is testified to. The rifle was loaded by Israel and left by a log near the house, of which he apprised Isaac, who was to make use of it, in the first instance. They had doubts whether they should be able to decoy Love to Israel's on that evening, but in case they did, it was arranged that Isaac could shoot him through the window while Nelson and Israel were engaged in cutting up the pork in the same room, and they were to despatch him in case the rifle failed to take complete effect. That about 7 o'clock or half past, and not later, for on this point the witnesses must have been in an error, while Nelson and Israel were in the room and Love was sitting before the fire with his boots and stockings and great coat off, in conversation with Nelson, his face partly turned towards Nelson and from the fire, Isaac came to the window as concerted, and shot him through the head, and immediately walked away to Irish's. Love did not fall, but convulsively drew up his feet and shoulders, and sat erect in the chair. Nelson then with the meat axe gave him the blow behind the ear, as described by the witnesses, which sallied him over a little; he then gave the second blow upon the back of the head, which brought him to the floor; he then inflicted the wound upon the face and neck as he lay upon the floor. Nelson does not recollect of giving but one blow, as described, on the face and neck, and doubtless the peculiarity of that wound and the appearance it presented of being the effect of two or more blows, results from the position in which he lay upon the floor. The body was then drawn out of the house by the two, and secreted near the end of the house; they finished cutting up the pork. Isaac then returned and exclaimed, "You have been butchering here, it seems;" to which Nelson replied that there had been butchering done. Isaac then said, "Well, I have done my part, and will do no more," and again went away. The blood upon the floor was then washed up, but there being some still upon the chair in which Love sat that was partly dried and difficult for them to wash off, a few pieces of bloody meat were put into the chair, which was by Israel's wife on her return laid away and the chair washed clean.

After the second departure of Isaac, the other two brothers took up the body and carried it to the brook, in the ravine, near the place of the grave, with the intention of burying it in the bottom of the brook; but after digging a few inches they were prevented from going further by rock. They then buried it where it was ultimately discovered. They then returned to the house, and from there went to Irish's; and all three of the brothers were there together, and stayed some time, and returned to Israel's, together with the wife. The father was perfectly innocent and ignorant of the murder.

Isaac states that when he first brought down the rifle to fire upon Love, his nerves failed him, and his aim was unsteady; but upon endeavoring to rally himself and reflecting upon some abuse Love had once used toward his aged mother, he regained his firmness, and fired with fatal effect.

As the day for their execution arrived, all of them became humble and penitent. They acknowledged the justice of their sentence and had no hope for commutation. Asked why they had done so foul a deed, Nelson replied that they had no other excuse than that Love had obtained through his successive small loans at high interest nearly all their property and was threatening to send them to prison. (Imprisonment for debt was in force at this time.) He added, "I thought I might as well run the risk of being hung as to lose my property and go to prison, too."

THE EXECUTIONS.

June 17.

At 2 o'clock today, Nelson, Israel, Jr., and Isaac Thayer were taken from the jail to an open field near Buffalo, and there were hanged on the same gallows in the presence of more than 20,000 people.

THE TRIAL OF MRS. MARGARET DOUGLASS FOR TEACHING COLORED CHILDREN TO READ, NORFOLK, VIRGINIA, 1853.

THE NARRATIVE.

A Southern lady¹ living with a daughter in Norfolk, Virginia, sixty-six years ago and being greatly interested in the religious and moral instruction of colored children and finding that the Sunday school where they were allowed to attend was not sufficient, invited them to come to her house, where in a back room upstairs she and her daughter taught them to read and write. She knew that it was against the law to teach slaves, and so she was careful to take none in her school but free colored children. One day a couple of city constables entered with a warrant and marched the two teachers and the children to the Mayor's office, where she was charged with teaching them to read, contrary to law. She explained that none of the children were slaves and that she had no idea that a child could not be taught to read simply because it was black. But the Mayor told her that this was the law, but as she had acted in good faith he would dismiss the case.

¹Mrs. DOUGLASS was born in Washington, D. C., but removed while quite young to Charleston, South Carolina, where she was married and resided until 1845, when at the death of her son, she went with her daughter, Rosa, to Norfolk, Va., to reside. Though a slave-owner herself and the daughter of slaveholders, she took an interest in giving religious instruction to negro children. The school which she established in her home came about in the following way, as described by her in her Narrative:

"There is a well known barber living in the city of Norfolk, a genteel and respectable colored man, much respected in that community. Having some business with him, I one day called at his shop, into which he politely invited me. Casting my eyes around, they fell upon two little colored boys, with spelling books in their hands, which they appeared to be very attentively engaged in studying. I inquired if they were his children, and if they went to school. His reply was, that they were his, but that they did not go to school, though he was very anxious to have them learn. I then inquired if there were no day schools for free colored children.

But the Grand Jury heard of it and indicted her, and at the next term of court she was tried for a violation of the Virginia code which provided that every assemblage of negroes for the purpose of religious worship, where it was conducted by a negro, and every assemblage of negroes for instruction in reading and writing, or in the night time, for any purpose, was unlawful, and if a white person assembled with negroes to

He smiled, and said, No, madam; and he believed that there was no one who took interest enough in little colored children to keep a day school for them. I replied, that this was a pity, but that there was certainly a large Sunday school connected with Christ's Church, to which he might send his children. His answer was, that his children did attend that school, but that they did not learn much; as they had no one to assist them in their lessons during the week; that he kept them at their books, whenever they had any spare time, and that they would occasionally pick up a little instruction from those who visited his shop. I inquired if he had any education himself. He said no, but that he indeed felt the want of it, and was very thankful to any one who would take the trouble to instruct his children. I then found that he had five children, three of whom were little girls, and that they were all very anxious to learn. Without further consideration or hesitation, I then offered to allow my daughter to teach his little boys, stating that she would do so with great pleasure. I told him to send them every day to my house, and that it need not detain them long from his business. He thanked me very kindly, and said that he would send them, although their time was very valuable to him, as they were obliged to wait upon the gentlemen who visited his shop. His eagerness for the instruction of his children deeply interested me, and, on my return home, I related the circumstance to my daughter, who readily assented to my proposal. Having no further business with this man, I saw no more of him, and had nearly forgotten the occurrence until he called at my house with his little girls. I received him politely, and spoke kindly to his children, who were neatly dressed, and very respectful, and appeared unusually intelligent. Their father then said, 'Mrs. Douglass, I have told my little girls of your kind offer to instruct their brothers, and they are also very anxious to learn, and I wish to know if you would not prefer to have these two eldest, thinking that the boys might give your daughter too much trouble.' I replied that it would be no trouble, but a pleasure to us, and that he might send both the boys and girls regularly every day, and that we would do all we could for their religious and moral instruction. I then inquired if they had any books. He replied, only such as had been given them at Christ Church Sunday school. 'Very well,' said I, 'give them those books, and send them tomorrow.' I felt certain that there could be nothing wrong in doing during the week what was done on Sunday by the teachers in that school, who were

instruct them to read and write, he should be fined and imprisoned. She refused the services of a lawyer and defended herself, and though she called several witnesses to show that the same thing had been done for years in the Sunday schools in the city, the jury convicted her, but placed the penalty at a fine of only one dollar. But this was overruled by the judge who sentenced her to be imprisoned for a month, which sentence was duly carried out.

members of some of the first families in Norfolk, nor in using the very books that were given to the children there taught. I was particular also to ascertain that both himself and family were free, as I knew the laws of the Southern States did not permit the slaves to be educated, although at the same time, all the churches in Norfolk were actually instructing from books both slave and free colored children, and had done so for years without molestation.

"On the day following the two little girls made their appearance alone, their father being unable to spare their brothers from his business. My daughter received her little scholars kindly, and endeavored to make them feel as comfortably as strange children can feel in a strange house. At this time I lived in a neat little house, containing four rooms, situated in a quiet and respectable neighborhood, with everything genteel and comfortable around us, gathered together by our own industry. In this house I had lived nearly four years. It was alone, and I had engaged it before it was finished, thinking it would form a quiet and retired home for myself and daughter. Nearly the whole block was built up with small tenements, and I soon found that my neighbors were not of the most refined class, and would prove no associates for us. I therefore determined to live very secluded, and be seldom seen or heard. . . .

"The two little girls continued to come every day, and were well behaved and very obedient. They soon became indeed, a source of pleasure to us. They were very attentive to their studies, and with my daughter's unremitting attention, they made rapid progress. They were with us nearly a month, when my daughter remarked to me, that she would be very sorry to part with them, as they learned very fast, and every day required more of her attention, and she feared that they would interfere with her other duties. Now, up to this time, I had not anticipated receiving any compensation for the tuition of those children, nor had I dreamed of establishing a regular school. What I had done had been merely from the impulses of common humanity, without a thought of reward. I casually asked my daughter which she would prefer, to teach those children, or assist me in sewing; and if she would be willing to take charge of a small class of free colored children. She replied that she was fond of children, and would be glad to teach them if she could establish a class. 'Very well,' said I, 'you shall do so: we will open a school on the first of next month, (which was June, 1852,) for free

THE TRIAL.²

In the Circuit Court of Norfolk, Virginia, November, 1853.

HON. RICHARD H. BAKER,³ *Judge.*

November 12.

Mrs. Margaret Douglass had been indicted on June 2, 1853, by the Grand Jury "for that the said Margaret Douglass and

colored children.' I thereupon sent word to Mr. Robinson, the father of the two little girls, notifying him of our intention, and stating that he might send us all the scholars that he could, and that the price of tuition would be three dollars per quarter. We were at once overrun with applications, and our little school was soon formed and well regulated, the children punctual in their attendance, and under good discipline. My daughter paid strict attention to them, and they made rapid progress in their studies. Our school numbered twenty-five pupils, of both sexes, and continued in prosperous existence about eleven months. We made no secret of the matter and never intended to do so, nor could we, had we desired to ever so much.

"The formation of our little school arose from a circumstance entirely accidental, I having at first offered simply to teach two or three colored children their Sunday school lessons; they being members of Christ's Church Sunday school; and from the very books given to them by the ladies and gentlemen engaged in that school. Finding those children obedient and well behaved, as well as anxious to be taught, I became deeply interested in their welfare, and continued from time to time to receive all who offered themselves as pupils. Living a life so retired, I needed an occupation involving some care, and was glad to be engaged in a duty so benevolent. We attended strictly to their moral and religious instruction, and, when they were sick, we promptly visited them, and administered to their wants, and, I am indeed happy to say, although I was afterwards cruelly cast into prison and otherwise unjustly dealt with, I have the satisfaction of knowing that I suffered in a good and righteous cause. I was totally ignorant of any existing law prohibiting the instruction of free colored children, but, at the same time, I was careful to have no slaves among our scholars. Everything passed on quietly for several months, in the ordinary routine of a child's school, with nothing to interest my readers particularly, until the descent was made on my school on the 9th day of May, 1843, between eight and nine o'clock in the morning, when the children had nearly all assembled. No note of warning had been given of this movement, and it was as unexpected as the sudden upheavings of an earthquake."

²*Bibliography.* ³"Educational Laws of Virginia. The Personal Narrative of Mrs. Margaret Douglass, a Southern woman, who was imprisoned for one month in the Common Jail of Norfolk, under the

Rosa Douglass and each of them did on May 9, 1853, at the City of Norfolk, unlawfully assembled with divers negroes for the purpose of instructing them to read and write, and did instruct them to read and write, contrary to the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Virginia." The charge was founded upon the Virginia code (August, 1849, Cap. 198, Sec. 31, 32, p. 748), which is as follows:

"Section 31. Every assemblage of negroes for the purpose of religious worship, when such worship is conducted by a negro, and every assemblage of negroes for the purpose of instruction in reading or writing, or in the night time for any purpose, shall be an unlawful assembly; any Justice may issue his warrant to any officer, or other person, requiring him to enter any place where such assemblage may be, and seize any negro therein; and he, or any other Justice, may order such negro to be punished with stripes.

"Sec. 32. If a white person assemble with negroes for the purpose of instructing them to read or write, or if he associate with them in an unlawful assembly, he shall be confined in jail not exceeding six months, and fined not exceeding one hundred dollars; and any Justice may require him to enter into a recognizance, with sufficient security, to appear before the Circuit, County, or Corporation Court, where the offense was committed, at its next term, to answer therefor; and in the meantime, to keep the peace and be of good behavior."

Rosa Douglass had left the state before the meeting of the Grand Jury, but *Margaret Douglass* appeared today and pleaded not guilty.

William T. Hendren, Prosecuting Attorney for the Commonwealth.

Mrs. Douglass declined counsel and asked that she be allowed to conduct her own case.

laws of Virginia, for the crime of Teaching Free Colored Children to Read. 'Search the Scriptures!' 'How can one read unless he be taught?'—Holy Bible. Boston: Published by John P. Jewett & Co., Cleveland, Ohio; Jewett, Proctor & Worthington. 1854."

³ BAKER, RICHARD HENRY. (1789-1871.) Born Mansemond Co., Va. Lawyer of high repute and Judge of the Circuit Court, including Mansemond County for thirty-five years and until his death. See *Cycl. Biog. Va.*, IV; *Eminent and Representative men of Virginia and D. C.*; Tyler, (Lyon G.) *Encycl. of Va. Biog*; Benton, (H. W.) *Hist. of Norfolk, Va.*, *Richmond Dispatch*, Dec. 2, 1871; *Richmond Whig*, Dec. 1, 1871.

THE WITNESSES FOR THE COMMONWEALTH.

Constable Cherry. Am a City Constable. On the morning of May 9th last, about nine, I went to defendant's home with a warrant from the Mayas Court. Knocked at the door and Mrs. Douglass answered. Asked her who occupied the second-story back room upstairs. She replied that she alone occupied all the house. Asked if Mrs. Douglass lived there. She said, I am Mrs. Douglass. I said, You keep a school. Yes, sir, was her reply. A school for colored children? She answered, yes. I said, I must see those children. She demanded what business I had with them, or with anything in her house. I replied, that I had been sent by the Mayor. Very good, sir, she said, walk in, and you shall see them; and took me upstairs into the school room. A back room in the second-story of the house. I found there quite a number, twenty or thirty negro children. There was a young white woman with them whom I understand was her daughter. The children were frightened and some of them began to cry. I told her I would have to take them all before the Mayor. Another Constable came up and we took down the names of the children and those of their parents. Mrs. Douglass stated that they were all or nearly all, free children and members of the Christ Church Sunday school. I told her that made no difference, that it was against the law and a penitentiary offense to teach any person of color to read or write, slave or free. Very well, she replied,

if they send me to the penitentiary it will be in a good cause and not a disgraceful one. We then went in a procession to Mayor Stubbs' office.

Constable Cox corroborated the testimony of the last witness.

C. C. Melson. Am the agent of Mr. Taylor, the owner of the house which was occupied in May last by the defendant. She has lived there ever since it was built several years ago. It was not rented for a negro school; did not know that one was kept there; she engaged the house when the foundation was laid, and had lived in it ever since.

The Prosecuting Attorney. Did you ever see any colored children entering it? I never watched my tenants' houses to see who went in or out.

Simon S. Stubbs. Am Mayor of Norfolk. On a complaint made to me that a lady named Douglass and her daughter were holding a school for black children in her home, I sent two Constables with a warrant to bring them before me for examination. She and her daughter appeared before me with about two dozen negro children. They were all brought into court by the Constables directly from the home, I believe. I remarked when they were all in the room that she had quite a large family. She said, yes, but they were all very good children. But, are you aware, I inquired, that it is a violation of the law of this State to instruct colored children to read? She replied that she had not been aware of the existing law until that morning; that

these were all free children, and that every one before me was a member of the Christ's Church Sunday school; that this school was held at the lecture room on Freemason street, where primers and other books were given to them to read; and that, if she had violated the law, they had been doing so for years. I replied that such facts had never been reported to me, or I should have been obliged to do my duty in the matter. A gentleman, who was present, voluntarily asserted that there was a large Sunday school kept there for colored children, and that he thought a violation of the law was such as much in one place as another. I then took up the statutes of Virginia, and read the law on the subject, which announced the maximum penalty attached to its violation to be a fine of one hundred dollars and imprisonment for six months. I also remarked that I was very sorry the matter had occurred, but that I must do my duty in the premises. She replied, that she expected me to do my duty; but that with a clear conscience she could bear imprisonment, or anything else, and asked if anything would be done with the children. I said, Nothing, and gave immediate

orders for their dismissal. She then inquired if anything would be done with their parents, and I answered, Nothing. She then asked if I could allow the whole responsibility of the matter to rest upon herself; that her daughter was not yet of age, and that she was alone responsible for any act of hers, as well as her own. I inquired if she had any friends who would become security for her appearance before the Supreme Court. Friends! she replied, I am my own best friend, and my daughter's only one. She told me to do my duty, and put her in prison at once, for she would ask no favors at the hands of any man. On receiving this reply, I reflected a while and then said, I think that I am allowed some discretion in this matter. You say, Mrs. Douglass, that you were not aware of the existing law? She replied that she was not, and that she was not disposed to violate the laws of any people or place where she might reside. I then, being perfectly satisfied with her good intentions, frank acknowledgment, and ignorance of the law, dismissed the case; for which she tendered me her thanks, and left the court room.

THE DEFENSE.

Mrs. Douglass. I wish, before examining my witnesses, to make a statement to the Court in reference to my daughter's absence. I beg leave to inform your honor, and you, gentlemen of the jury, that my daughter, whose name is joined with mine in this prosecution, is at present in the city of New York, and was there at the time the summons was issued and served upon me: but, if she were in Norfolk at this time, I do not

know that you have any business whatever with her. She is under age, and has been brought up in strict obedience to me in all things. I am alone responsible for any act of hers, as well as for my own. I am here to answer to any charge that may be brought against me. I have been notified to present myself this day before this court to answer to the charge of having been engaged in teaching colored children to read and to write, and I am informed that in so doing I have been acting against the peace and dignity of the Commonwealth. This charge, gentlemen, I do not like, but we shall see who it is that destroys our peace and insults our dignity.

Walter Taylor (sworn.) *Mrs. Douglass.* Were you a teacher in the Christ Church Sunday school? A. For the white children I was, and the school was held in the church. Q. Did you never visit the lecture room? A. I had nothing to do with the school that was kept there? Q. Did you never distribute books to the negro children of that school? A. I attended the library of the school for white children. Q. Did you not instruct colored children to read from those books? A. I did not.

John Williams. Am a lawyer and clerk of the Circuit Court. Myself and daughter teach in the Christ Church Sunday school. We do not teach the negro children to read.

William Sharp (sworn.) *Mrs. Douglass.* Were you a teacher in the school for colored children, held in Christ's Church lecture room? A. No, madam. Q. Did you not attend the Sabbath school held there for the instruction of negro children? A.

I went there, occasionally, and lectured to them. Q. Did you not distribute books among them? A. The ladies had all to do with that! Q. When you visited that school, did you not instruct them yourself? A. I did not teach them to read and write, I do not know that the law prohibits religious and moral instructions to negroes.

Mrs. Douglass. If you, sir, who are engaged in the practice of the law, did not know it, how could it be expected that I should?

Mr. Sharp. I ask the Court to allow me to explain. Certain negroes appeared to Rev. Mr. Cummings, the Pastor of Christ's Church, for religious instruction and were allowed by him to meet for that purpose in the lecture room of the church. I occasionally visit the school and lecture to them. I found that some of them could read very well, but that when they came to the hard words, I allow them to skip over them.

Mrs. Douglass. Gentlemen of the Jury: I now deem it right and proper that you should know something of Mrs. Douglass,

who stands before you charged with violating your laws. I do not plead guilty to this charge, for, in my opinion, to be a violator of any law or laws, the individual must know that they are such, which I did not, and had abundant precedents among those who should have known it, if they were such, for what I did. I am a Southern woman by birth, education and feeling. I have been a slaveholder myself, and I would be again, if I felt so disposed. I am a native of and have always resided in a Southern slave state. The home of my childhood is as dear to me as my life, and I am as deeply interested in the welfare of Virginia, and of the whole united Southern slave states, as I am in the State of South Carolina; yes, and a great deal more so than very many who call themselves men. I am no abolitionist, neither am I a fanatic, and I am by education as strongly opposed as you are to the interference of Northern anti-slavery men with our institutions, although I believe that their principles are based on a religious foundation. I deem it the duty of every Southerner, morally and religiously, to instruct his slaves, that they may know their duties to their masters, and to their common God. Let the masters first do their duty to them, for they are still our slaves and servants, whether bond or free, and can be nothing else in our community. Let us not quarrel with our neighbors, but rather look around us and see what we have ourselves to do that we have left undone so long. I am a strong advocate for the religious and moral instruction of the whole human family. I have always instructed my own slaves, and will continue to do so as long as I remain in a slave state. Still, I am not disposed to violate the laws of any people or place where I may chance to reside. I cannot believe for a moment that this prosecution is a mere matter of dollars and cents, or that there is not one truly good and noble hearted man among you. Oh no; this I cannot and will not believe. Then let it be the welfare of your people and your country that you seek, and I am with you, heart and soul. This is a matter that calls for the consideration of every true and noble heart—the common welfare of our people. So far as my knowledge of human nature extends, the man who is

born a coward, nursed in the lap of ignorance, and brought up a coward, naturally dies a coward. The application of this I leave to yourselves.

The children whom I had for instruction were members of Christ's Church Sunday school. My own little servant was handed a primer by one of the teachers of that school, with the instruction that he must study his book, and attend the Sunday school. He was made ready by myself or daughter, and sent every afternoon with his book, to that school. This was done for two years before I interested myself in these children in the form of a regular day-school. I believe it is not expected that ladies will come to the court house to learn the laws, rules, and regulations of a city in which they may happen to reside. In my opinion, whatever the religious portion of the community is engaged in doing, whether in city, town, or country, is generally considered as lawful and proper. We took care of those children, visited them when sick, and ministered to their wants, and it was a pleasure for us to do so. Was there anything wrong in this?

Let us look into the situation of our colored population in the city of Norfolk, for they are not dumb brutes. If they were, they would be more carefully considered, and their welfare better provided for. For instance, two or three of these people are not allowed to assemble together by themselves, whether in sickness or in health. There is no provision made for them, whatever the circumstances may be, and such meetings are pronounced unlawful and treasonable. Think you, gentlemen, that there is not misery and distress among these people? Yes, indeed, misery enough, and frequently starvation. Even those that are called free are heavily taxed, and their privileges greatly limited; and when they are sick, or in want, on whom does the duty devolve to seek them out and administer to their necessities? Does it fall upon you, gentlemen? Oh no, it is not expected that gentlemen will take the trouble to seek out a negro hut for the purpose of alleviating the wretchedness he may find within it. Why then persecute your, benevolent ladies for doing that which you your-

selves have so long neglected? Shall we treat our slaves with less compassion than we do the cattle in our fields?

. In my opinion, we have nothing to fear from the true blooded negro. It is the half-breed, or those with more or less white blood in their veins, whom I have always found presumptive, treacherous and revengeful. And do you blame them for this? How can you? Ask yourselves the cause. Ask how that white blood got beneath those tawny skins, and let nature herself account for the exhibition of these instincts. Blame the authors of this devilish mischief, but not the innocent victims of it.

As for myself, I shall keep on with my good work; not, however, by continuing to violate what I now know to be your laws, but by endeavoring to teach the colored race humility and a prayerful spirit; how to bear their sufferings as our Savior bore his for us all. I will teach them their duty to their superiors, how to live, and how to die. And now, if ignorance of your peculiar laws is not a sufficient excuse for my violation of the letter of them, surely my good intentions, and the abundant examples set before me by your most worthy and pious citizens, ought to convince you that I was actuated by no improper motives, and had no ulterior designs against the peace and dignity of your Commonwealth. But, if otherwise, there are your laws: enforce them to the letter. You may send me, if you so decide, to that cold and gloomy prison. I can be as happy there as I am in my quiet little home; and, in the pursuit of knowledge, and with the resources of a well-stored mind, I shall be, gentlemen, a sufficient companion for myself. Of one consolation you cannot deprive me: I go not as a convicted felon, for I have violated no tittle of any one of the laws that are embodied in the Divine Decalogue; I shall be only a single sufferer under the operation of one of the most inhuman and unjust laws that ever disgraced the statute book of a civilized community.

The *Prosecuting Attorney* made a few remarks, not urging a conviction very strongly, but stating the law in the case to the jury.

THE VERDICT AND SENTENCE.

November 13. •

The *Jury* this morning returned into court with a verdict of *Guilty*, and fixing the penalty at a fine of one dollar. The COURT then adjourned for the term.

January 10, 1854.

After the adjournment of the COURT on November 13, *Mrs. Douglass* obtained permission from the Judge and the Sheriff to visit New York, where she remained several weeks, returning to Norfolk with her daughter. She appeared today for sentence.

JUDGE BAKER. Upon an indictment found against you for assembling with negroes to instruct them to read and write, and for associating with them in an unlawful assembly, you were found guilty, and a mere nominal fine imposed, on the last day of this court held in the month of November. At the time the jury came in and rendered their verdict you were not in court, and the Court being about to adjourn for the purpose of attending to other official duties in a distant part of the State, it was necessary and proper, under the law, to award a *capias* against you, returnable to the present adjourned term, so that the judgment and sentence of the law may be fulfilled. The Court is not called on to vindicate the policy of the law in question, for so long as it remains upon the statute book, and unrepealed, public and private justice and morality require that it should be respected and sustained. There are persons, I believe, in our community, opposed to the policy of the law in question. They profess to believe that universal intellectual culture is necessary to religious instruction and education, and that such culture is suitable to a state of slavery; and there can be no misapprehension as to your opinions on this subject, judging from the indiscreet freedom with which you spoke of your regard for the colored race in general. Such opinions in the present state of our society I regard as manifestly mischievous. It is not true that our slaves

cannot be taught religious and moral duty, without being able to read the Bible and use the pen. Intellectual and religious instruction often go hand in hand, but the latter may well exist without the former; and the truth of this is abundantly vindicated by the well-known fact that in many parts of our own Commonwealth, as in other parts of the country in which among the whites one-fourth or more are entirely without a knowledge of letters, respect for the law, and for moral and religious conduct and behavior, are justly and properly appreciated and practiced.

A valuable report or document recently published in the city of New York by the Southern Aid Society sets forth many valuable and important truths upon the condition of the Southern slaves, and the utility of moral and religious instruction, apart from a knowledge of books. I recommend the careful perusal of it to all whose opinions concur with your own. It shows that a system of catechetical instruction, with a clear and simple exposition of Scripture, has been employed with gratifying success; that the slave population of the South are peculiarly susceptible of good religious influences. Their mere residence among a Christian people has wrought a great and happy change in their condition: they have been raised from the night of heathenism to the light of Christianity, and thousands of them have been brought to a saving knowledge of the Gospel.

Of the one hundred millions of the negro race, there cannot be found another so large a body as the three millions of slaves in the United States, at once so intelligent, so inclined to the Gospel, and so blessed by the elevating influence of civilization and Christianity. Occasional instances of cruelty and oppression, it is true, may sometimes occur, and probably will ever continue to take place under any system of laws: but this is not confined to wrongs committed upon the negro; wrongs are committed and cruelly practiced in a like degree by the lawless white man upon his own color; and while the negroes of our town and State are known to be surrounded by most of the substantial comforts of life, and invited both by precept

and example to participate in proper, moral and religious duties, it argues, it seems to me, a sickly sensibility towards them to say their persons, and feelings, and interests are not sufficiently respected by our laws, which, in effect, tend to nullify the act of our Legislature passed for the security and protection of their masters.

The law under which you have been tried and found guilty is not to be found among the original enactments of our Legislature. The first legislative provision upon this subject was introduced in the year 1831, immediately succeeding the bloody scenes of the memorable Southampton insurrection; and that law being found not sufficiently penal to check the wrongs complained of, was re-enacted with additional penalties in the year 1848, which last mentioned act, after several years' trial and experience, has been re-affirmed by adoption, and incorporated into our present code. After these several and repeated recognitions of the wisdom and propriety of the said act, it may well be said that bold and open opposition to it is a matter not to be slightly regarded, especially as we have reason to believe that every Southern slave state in our country, as a measure of self-preservation and protection, has deemed it wise and just to adopt laws with similar provisions.

There might have been no occasion for such enactments in Virginia, or elsewhere, on the subject of negro education, but as a matter of self-defense against the schemes of Northern incendiaries, and the outcry against holding our slaves in bondage. Many now living well remember how, and when, and why the anti-slavery fury began, and by what means its manifestations were made public. Our mails were clogged with abolition pamphlets and inflammatory documents, to be distributed among our Southern negroes to induce them to cut our throats. Sometimes, it may be, these libelous documents were distributed by Northern citizens professing Southern feelings, and at other times by Southern people professing Northern feelings. These, however, were not the only means resorted to by the Northern fanatics to stir up insubordination among our slaves. They scattered far and near pocket handkerchiefs, and other

similar articles, with frightful engravings, and printed over with anti-slavery nonsense, with the view to work upon the feeling and ignorance of our negroes, who otherwise would have remained comfortable and happy. Under such circumstances there was but one measure of protection for the South, and that was adopted.

Teaching the negroes to read and write is made penal by the laws of our State. The act imposes a fine not exceeding one hundred dollars, to be ascertained by the jury, and imprisonment not exceeding six months, to be fixed and ascertained by the Court. And now, since the jury in your case has in my opinion properly settled the question of guilt, it devolves on me, under the law, to ascertain and decide upon the quantum of imprisonment under the circumstances of your trial; and I exceedingly regret, that in being called on for the first time to act under the law in question, it becomes my duty to impose the required punishment upon a female, apparently of fair and respectable standing in the community. The only mitigating circumstance in your case, if in truth there be any, according to my best reason and understanding of it, is that to which I have just referred, namely, you being a female. Under the circumstances of this case, if you were of a different sex, I should regard the full punishment of six months' imprisonment as eminently just and proper. Had you taken the advice of your friends and of the Court, and had employed counsel to defend you, your case no doubt, would have been presented in a far more favorable light both to the Court and to the jury. The opinions you advanced, and the pertinacity and zeal you manifested in behalf of the negroes, while they indicated perfect candor and sincerity on your part, satisfied the Court, and must have satisfied all who heard you, that the act complained of was the settled and deliberate purpose of your mind, regardless of consequences, however dangerous to our peace.

In conformity with these views, I am impelled by a feeling of common honesty, to say that this is not a case in which a mere formal judgment should be announced as the opinion of

the Court. Something more substantial under the circumstances of this case, I think, is demanded and required. The discretionary power to imprison for the term of six months or less, in good sense and sound morality, does not authorize a mere minimum punishment, such as imprisonment for a day or week, in a case in which the question of guilt is free from doubt, and there are many facts and circumstances of aggravation. A judgment of that sort, therefore, in this case, would doubtless be regarded by all true advocates of justice and law as mere mockery. It would be no terror to those who acknowledge no rule of action but their own evil will and pleasure, but would rather invite to still bolder incendiary movements. For these reasons, as an example to all others in like cases disposed to offend, and in vindication of the policy and justness of our laws, which every individual should be taught to respect, the judgment of the Court is, in addition to the proper fine and costs, that you be imprisoned for the period of one month in the jail of this city.

Mrs. Douglass was immediately incarcerated, and spent a month in prison, one week of which was passed in sickness. She received every allowable attention from the jailor and his wife, and remained with them a day or two after her sentence expired.

THE TRIAL OF ALEXANDER McLEOD FOR THE BURNING OF THE STEAMBOAT CAROLINE, AND THE MURDER OF AMOS DUR- FEE, UTICA, NEW YORK, 1841.

THE NARRATIVE.

In 1837 a portion of the people of Canada, led by William Lyon Mackenzie^a and Louis J. Papineau,^b rose in rebellion against British rule in the provinces with the view of setting up a republic. After a few skirmishes, the insurrection was put down, and many of the insurgents took refuge on Navy Island, in the Niagara River, near the American boundary. The Caroline, a little steamboat owned by a citizen of the United States, was employed in carrying supplies to the island, and the British determined to destroy her. On the night of

^a MACKENZIE, WILLIAM LYON. (1795-1861.) Born Dundee, Scotland. Emigrated to Canada 1820, where he opened a drug and book store at Little York, now Toronto. Removed to Queenstown, 1820, but soon deserted business for journalism and politics. Elected to Provincial Parliament for York in 1828, but expelled five times for alleged libels on the government. After four re-elections he was finally allowed to take his seat. In 1832 went to London with a petition of grievances from the Canadian reformers. First Mayor of Toronto, 1834. In December, 1837, he headed an insurrection against the Government of Canada, but his forces were defeated and he fled to Navy Island, where he established a provisional government. The United States Government arrested him for breach of the neutrality laws and he was imprisoned. On his release, became a contributor to the New York Tribune and other papers. In 1849 he returned to Canada and was elected to Parliament until 1858. He died in Toronto. See Lindsay's Life of William Lyon Mackenzie.

^b PAPINEAU, LOUIS JOSEPH. (1789-1871.) Born in Montreal. Admitted to Quebec (Lower Canada) Bar, 1812. Member Legislative Assembly, 1809-1812. Served in the War of 1812. Speaker Lower Canada House of Assembly, 1815-1835. Member Executive Council, 1820. After the failure of the Canadian rebellion he fled to the United States, and in 1839 went to France, residing in Paris until 1847, when a general amnesty being proclaimed, he returned to Canada and was elected to Parliament. Died in Montibello, Quebec.

December 29, 1837, a flotilla of five boats set out for this purpose, but not finding her here, they searched until they found her moored at Grand Island, part of the territory of the State of New York. The British boarded the vessel, overpowered the crew, killing one man, set the boat on fire and sent her burning over the falls. The American government then made a demand on the British government for reparation; but the matter was left unsettled for several years, and was at length dropped by the United States.

Meantime, one Alexander McLeod, a worthless resident of Upper Canada (now Ontario), made the boast that he was a member of the party that destroyed the *Caroline*, and had himself killed one of the Yankees. And one day, while in Buffalo, N. Y., he repeated his boast, and was instantly arrested and clapped into prison. The British government made a demand that he be released, and President Tyler would have gladly released McLeod, but he was in the hands of New York State, and she refused to give him up. Great Britain began to mobilize and prepare for war. New York, meantime, having no foreign relations, calmly held the prisoner. Its Supreme Court, to which tribunal the United States applied for his release, ruled that the orders of the British military authorities were not a protection, and he was tried before a court at Utica for murder and arson. But it was proved that the blustering braggart had not been present at the destruction of the *Caroline*, and that his boast was an idle and a false one. He was acquitted and all signs of war disappeared.^c

THE TRIAL.¹

In the Circuit Court Oneida County, Utica, New York, October, 1841.

HON. PHILO GRIDLEY,² Judge.³

At the February term of the General Sessions of the County of Niagara, New York, an indictment had been found by the Grand Jury against Alexander McLeod, a subject of Great

^c Elson, History U. S.

Britain, and a resident of Upper Canada, and certain other persons.

The indictment having been removed to the Supreme Court, a writ of *habeas corpus* was issued upon which he was brought before that court and a motion made that he be discharged for the following reasons, viz. :

That in December, 1837, about 200 men from the State of New York took forcible and hostile possession of Navy Island, in the Niagara River, lying within the Province of Upper Canada.

That the occupants of Navy Island were largely composed of citizens of the United States, and were commanded by Rensselaer Van Rensselaer, one of such citizens.

That these invaders were supported with provisions and arms exclusively from the United States and by citizens thereof.

That the object of the invasion as then proclaimed was to cause

¹ *Bibliography.* *"Trial of Alexander M'Leod, for the Murder of Amos Durfee; and as an Accomplice in the Burning of the Steamer Caroline, in the Niagara River, during the Canadian Rebellion in 1837-38. New York. Published at the Sun Office. 1841."

"Gould's Stenographic Reporter; Published Monthly in the City of Washington, and devoted to the recording of Important Trials for Treason, Murder, Highway Robbery, Mail Robbery, Conspiracy, Riot, Arson, Burglary, Seduction, Etc. Also Miscellaneous Speeches of American Statesmen in Congress and State Legislatures; Lawyers and Judges in the Supreme Court of the United States and Individual States; Political Addresses, Orations, Lectures upon Arts, Sciences, Literature and Morals. Vol. II. 1841. (13 Sheets, Periodical.) This work is published and sent through the mail in monthly numbers of 64 pages—making two volumes a year of 384 pages each, at \$1 the volume, or \$2 a year, payable in advance. All communications must be franked, or postage paid. Address Gould's Reporter, Washington, City, D. C."

"The Trial of Alexander McLeod for the Murder of Amos Durfee at the Burning and Destruction of the Steamboat Caroline by the Canadians, December 29, 1837. Reported by Marcus T. C. Gould Stenographer, assisted by H. Fowler, Esq., Stenographer of Canada. Published by Gould, Banks & Co., New York, and William A. Gould, Albany, Nov. 1, 1841."

² GRIDLEY, PHILLO. (1796-1864.) Born Paris, Oneida Co., N. Y. Graduated Hamilton Coll., 1816. Admitted to bar, 1820. Began practice in Waterville. Removed to Hamilton, Madison Co., and became District Attorney. Appointed Circuit Judge for Fifth Judicial District, 1838. Removed to Utica, 1839. Judge of State Supreme Court, 1846-1852. Also served in Court of Appeals. Died in Utica. See Cookinham Hist. of Oneida Co., N. Y.

³ Judges White, Kimball and Jones, of the Oneida County Court, sat on the bench but took no part in the trial.

the said Province to be separated from the Government of Great Britain and to erect it into a new and independent nation by force.

That in order to repel such invasion, an army of about twenty-five hundred strong was assembled at Chippequa by the authorities and under the direction of the Provincial Government.

That on the 30th of December, 1837, the steamboat *Caroline* proceeded from Black Rock, or Buffalo, landed a quantity of military stores on Navy Island, and commenced plying between the said island and Schlosser, in the State of New York, transporting to the said island men and provisions and implements of war for the support and comfort of those who were then engaged in hostility against the Government of Great Britain.

That on the evening of the next day an expedition of seven small boats with sixty-three armed men was fitted out at Chippequa under the direction of Allen McNabb, lawfully in command of her Majesty's forces and invested with full authority to do so, commanded to take the said steamboat *Caroline* by force wherever found, and bring her in or destroy her.

That the persons who composed said expedition found the said steamboat *Caroline* fastened to the dock at Schlosser, and there, by the use of swords and fire-arms, expelled those who occupied her, and destroyed her; and that one Amos Durfee, a man employed on the said steamboat, was killed by being shot through the head with a pistol or musket ball by some one of the persons engaged in that expedition and while engaged in accomplishing the object thereof.

That the destroying of the said steamboat *Caroline*, and the conduct of the persons engaged in such destruction, including the killing of said Durfee, had since been approved and adopted by the Government of Great Britain as a necessary act to self-defense on the part of the authorities of Upper Canada.

That the Government of the United States, immediately after the destruction of the said steamboat *Caroline*, demanded reparation of the Government of Great Britain.

It was further averred that McLeod was not one of the persons engaged in the expedition against the *Caroline*, and that he had nothing to do with the killing of said Durfee.

The argument before the Supreme Court was opened by *Alvin C. Bradley* for McLeod. After *Jonathan L. Woods*, District Attorney of Niagara County, and *Willis Hall*, Attorney-General of the State of New York, had been heard, *Joshua A. Spencer* made the closing argument on behalf of McLeod, concluding as follows:*

"If war must come, let it come. As Americans we will meet it, but let us not forget that 'Thrice is he arm'd that hath his quarrel

* See 25 Wend. 542, 565.

just.' Great Britain has avowed this open, flagrant violation of our territory, with all that was done. Let us take her at her word and hold her to her responsibility. When she has denied our right, and refused to make suitable and honorable reparation, when moderation and forbearance cease to be virtues, then will the President of the United States inform the council of the nation of the true state of the question, of which we know so little, and then shall its collected wisdom choose its own time and mode of redress.

The trial of McLeod savors of cowardice and revenge, and is unworthy of our country; but the trial of the British nation we, as Americans, understand, and, when necessary as Americans will attend. In that trial there will be no British party on this side of the waters.

But let this most troublesome and embarrassing difficulty be removed, in the only way in which it can be done in law and honor, and leave the United States Government in the free exercise of its constitutional powers, and there is every reason to believe that all the great questions which now agitate the two nations will be speedily, justly and honorably settled, their peace be preserved, and the prosperity and happiness of our country be perpetuated to after generations. Let the National and State governments continue to move only in their respective spheres, regarding alike the rights of each other and the law of nations; let them cherish their own honor and dignity, by regarding the honor and dignity of other nations, and not only the Attorney General, but all of us, will be satisfied with the respect accorded to the exclamation, 'I am an American citizen.' "

The Supreme Court (JUDGE COWEN delivering the opinion) held that, assuming the facts stated in the affidavit of McLeod to be true, he was liable to be proceeded against individually in the criminal courts of the State of New York, and held to trial for arson in the destruction of the steamboat *Caroline*, and for the murder of Durfee. JUDGE COWEN⁵ also held that upon a writ of *habeas corpus* the Court or officer before whom the proceedings were had could not, upon the subject of the guilt or innocence of the accused, look behind the indictment; and, therefore, even if the facts stated in the affidavit were true and undisputed, and constituted a complete defense to the charge made, the prisoner should remain in jail without bail until a trial could be had before a Court and jury.⁶ The indictment was now removed from Niagara to Oneida County.

It charged in a number of counts that Alexander McLeod

⁵ See *post*, p. 311.

⁶ 25 Wend. 596; 26 Wend. 603.

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did kill and murder one Amos Durfee with a gun, with a pistol, with divers other deadly weapons, etc.; that certain other persons, John Mosier, Thomas McCormick and Rolland McDonald, committed the murder and that McLeod was an accessory; that McLeod and others seized and burned a steamboat called the Caroline, etc.

October 4.

The *prisoner* had been previously arraigned and pleaded *not guilty*.

Willis Hall,⁷ Attorney-General; *Jonathan L. Woods*,⁸ District Attorney; *Timothy Jenkins*⁹ and *Seth C. Hawley*,¹⁰ for the People.

Hiram Gardner,¹¹ *Joshua A. Spencer*¹² and *Alvin C. Bradley*, for the prisoner.

⁷HALL, WILLIS. (1801-1868.) Born Granville, N. Y. Graduated Yale, 1824. Admitted to bar, 1827, and practiced at Mobile, Ala. In 1831 returned to New York City and continued practice. Member of State Assembly, 1837. Attorney-General, 1838. Lecturer at Saratoga Law School. Died New York City. See Hist. Bench and Bar of New York.

⁸WOODS, JONATHAN. District Attorney for Niagara Co., N. Y. Member State Assembly, 1832.

⁹JENKINS, TIMOTHY. (1799-1859.) Born Barre, Mass. District Attorney Oneida Co., N. Y., but resigned to enter Congress, of which he was a member for a number of years.

¹⁰HAWLEY, SETH COTTON. (1810-1884.) Member of Assembly Erie Co., N. Y., 1840-1841. Commissioner to revise New York Code, 1848.

¹¹GARDNER, HIRAM. (1800-1874.) Born Dutchess Co., N. Y. Admitted to practice and settled in Lockport, 1822; Associate Judge Common Pleas, 1825; Supreme Court Commissioner and Master in Chancery, 1827; Surrogate, 1831-1836; member N. Y. Assembly, 1836; member State Constitutional Convention, 1845; County Judge and Surrogate, 1847; Canal Commissioner, 1858-1863; County Judge, 1868-1874. See Hist. Niagara Co., 1878; Pool, Landmarks of Niagara Co., 1897.

¹²SPENCER, JOSHUA AUSTIN. (1790-1857.) Born Gt. Barrington, Mass. Educated in local public schools and academy; served in War of 1812; studied law and practiced several years in Lenox, Mass.; removed to Utica, N. Y., 1828. From 1841 to 1845, was U. S. District Attorney for northern New York, which then included practically the whole State; State Senator, 1846; Mayor of Utica, 1848. See Brown & Butcher, Outline Hist. of Utica; Cookingham Hist. of Oneida Co.; Hist. of Bench and Bar of N. Y. "In important cases in the City of New York he was not unfrequently

A few minutes before ten the *prisoner* was brought into court, walking deliberately to a seat within the bar, near his counsel. He was dressed neatly in a suit of black, and was wrapped in the ample folds of a blue coat. His counsel shook him cordially by the hand, and he gracefully returned the salutations of others. He is a man of gentlemanly bearing and demeanor, and he appeared respectful but not embarrassed.

The following jurors were selected and sworn: Charles O. Curtis, Paris; Edmund Allen, Augusta; John Mott, Sanger-

retained." Clinton: Celebrated Trials, 280. Francis Kernan, sometime United States Senator, studied law with him and afterwards became his partner and Roscoe Conkling was a legal pupil of Mr. Spencer, and was admitted to the bar from his office.

Mr. Spencer was subjected to severe criticism for acting as counsel for a person indicted by the State for murder when he was at the time the United States' Prosecuting officer in the District in which the indictment was found and the prisoner tried. In vindicating his conduct in this respect, Mr. Spencer said that it had been argued that his appointment under the Federal Government should induce him to relinquish the defense of McLeod; but he would say to all such, that they little understood, either the duties of his office, the merits of the question involved in this defense, or his own views of responsibility, if they thought him capable of such conduct; for he had yet to learn that a counsellor of the State of New York was called upon to give up duties he owed to his client, because other duties, entirely compatible with the faithful discharge of his former ones, had devolved upon him. He should endeavor to discharge both duties according to the best of his ability. At an early stage of the proceeding, and before his appointment to office, he had been retained as counsel for McLeod; as such, and not as attorney for the United States, he now appeared before this Court, and he did not believe that the duties he owed to his client in the one case, would run counter to those he owed to his country in the other. All that had been done in this case by his eloquent young friend who opened this argument, and by his partner, moreover, had been done in conformity with his views, or under his advice; and if there was any odium or crime in what had been done, he was willing to bear his full share, and answer therefor before the tribunals of his country and in the face of the world. The attempt to make political capital out of this question, which he said had been made by some of the partisan prints of both political parties, deserves the reprobation of every fair mind. Its tendency is to prevent an impartial trial, if a trial is to be had; to strengthen and deepen the prejudices which already unhappily exist on both sides of our borders; to embarrass the negotiations pending between our own and the British Governments, and to expose them to open rupture.

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field; Elisha Brush, Rome; Ira Byington, Camden; Wm. Carpenter, Kirkland; Isaiah Thurber, Utica; Peter Sleight, Westmoreland; Asher Allen, Augusta; Seymour Carrier, Steuben; Eseck Allen, Floyd; Volney Elliot, Kirkland.

THE ATTORNEY-GENERAL'S OPENING.

Mr. Hall. Gentlemen of the Jury: I stand before you in obedience to the law, and in the name of the People of New York, to make out before you the charge of murder against Alexander McLeod, the prisoner at the bar. The Grand Inquest, upon the solemnity of their oaths, have denounced against the prisoner at the bar, the blackest in the catalog of crimes. And it now devolves upon me to place before you the evidence of his guilt. Gentlemen, it cannot be disguised that this trial has produced an extraordinary excitement in the public mind. We have witnessed it in the crowding masses of anxious citizens, who have collected here to witness the transactions of this day. We have witnessed it in these paroxysms of public agitation; and it is for that reason that I feel called upon to put you on your guard—to warn you of your danger—for these are stumbling blocks in the way of your oaths, upon which hundreds have fallen. Whatever may have been the extraneous causes which have produced this exhibition of unusual popular excitement, it is one with which neither you nor I have properly anything to do—unless to shut our eyes and our ears—to close up every avenue to our minds against them. If possible, we should forget that we are not here, alone, with the prisoner and his witnesses. We should forget that there is any ear to hear, or eye to see, save that alone of the all-seeing God of Justice. My duty, gentlemen of the jury, like yours, is as plain and as easy to be discerned, as it is difficult to be performed. To array and present to you—to examine and enforce, and urge upon you the testimony which bears against the life of a human being, is always a painful duty. But, gentlemen, it is a duty as peremptory and paramount as it is painful. Thank God, it is no part of my duty to attempt to blind, deceive, or mislead you. I am not required to insist

upon any principle which I do not believe to be in accordance with law and evidence—which I do not believe to be true. The task to which my oath binds me, is nothing more nor less than with an unshrinking mind to elicit the truth and place it clearly before you. A task, in this case, embarrassed with all that we see around us—with prejudices in many quarters, with many unfounded and false rumors, with the interests and passions of men, which it has excited: a task which overwhelms me with the sense of the greatness of my responsibility, and drives me, with unfeigned humility, to throw myself upon your indulgence, and pray you not to let the cause of Justice suffer on account of any deficiency on the part of her humble advocate. If you shall see that through any bias, fear, or innate weakness, I do not press it as may be necessary for the development of truth, I pray you to redouble your own vigilance, that the truth may not escape you, and that you may not be overwhelmed with error. If, on the other hand, you shall perceive an effort to sustain my cause against proof, or in consequence of the array of eloquence and talent enlisted for the prisoner, I should seem to be captious or over zealous, place it against me. But let it not turn your hearts against the truth of the case which I present to you. The indictment found by the Grand Jury, and which is now presented for your consideration and investigation, charges the prisoner at the bar, Alexander McLeod, with having murdered, on the 29th day of December, 1837, Amos Durfee. This charge is presented in various forms or counts—they are seventeen in number. They are presented in these various forms, in order to meet the testimony as it shall be presented. The substance of the indictment is, that Durfee was killed and murdered by the hand of the prisoner at the bar, or by some other person with whom the prisoner was connected—aiding or assisting. To sustain this indictment, it will be proved before you, that upon or about the 29th day of December, 1837, a steamboat called the *Caroline*, a boat of some 30 or 40 tons burden, left the harbor of Buffalo for Schlosser, about eighteen miles below Buffalo and two miles above Niagara Falls. This boat was

manned by citizens, enrolled at the Custom House in Buffalo, according to the laws of the United States. She had a license from the Collector of the Port of Buffalo to ply between Buffalo and Schlosser. At that time, gentlemen of the jury, a band of some two or three hundred Canadian insurgents had taken possession of Navy Island. They possessed it and claimed to hold it, under the name of the provisional government of Upper Canada. There had been in Canada great excitement, and this excitement extended all along our borders. Efforts were made by the Canadian insurgents to enlist our citizens in their cause. The fugitives from the terrible massacres of St. Charles and St. Eustache, whose houses were burned and property destroyed—and whose wives and children had been forced into the driving snows of a Canadian winter, found no difficulty, upon telling the tale of their dreadful sufferings, in eliciting the sympathies of our fellow citizens. And it was but an easy and natural step, from sympathizing with the sufferings of the refugees, to sympathize also in their cause. And, thus stimulated and excited, some of the more reckless young men joined the insurgents upon Navy Island. For this act Great Britain has bitterly complained; and in our own country many of our most judicious citizens have looked upon it as a grievous fault. Gentlemen, it is no part of my case, nor is it my design, to vindicate the conduct of the patriots or insurgents; but it is not irrelevant to my case to state thus far; that those of our fellow citizens who, without forming any military enterprise, or organizing any body upon our own soil—single-handed and alone, left our territory and united themselves with a foreign power, have violated no law of our State, no law of the United States, no law of nations. They have done no more than has been done again and again by the people of every nation. Your own recollections of history will furnish your minds with hundreds of examples. The Swiss nation have for hundreds of years fed all the armies of Europe; and who ever thought of holding them responsible for it? They did no more than Admiral Lord Cochrane did in taking part with South America. They did no more than

Lord Byron did, who gave his life to aid the Greeks in breaking the chains of Turkish bondage. They did no more than La Fayette—the good, the glorious La Fayette—who in his love for human liberty crossed the Atlantic, and gave his life and princely fortune in the struggle of the patriots in our own Revolution. Gentlemen, I am not deviating from the case further than is necessary to remove the just odium under which the case labors, by having heaped upon it that which has been unjustly thrown upon those who joined the insurgents. I wish to set before you distinctly, that in this case, it will appear in proof, that the *Caroline* was not connected with the insurgents on Navy Island, that she was not in their employment, or in any way connected with their operations. It will appear from the testimony, that the objects of the owners of the *Caroline* was of a totally different character. This collection upon Navy Island had excited great curiosity throughout the country. At this period of the year, the lakes and the canals were closed with ice. Those whose usual occupation was to navigate those waters, were relieved from their labor—and this was a season of leisure. Winter had set in—the farmer and his sons and laborers were relieved from the cultivation of the soil, and had leisure to enjoy the fruits of their labor. It was about the time of the Christmas holidays. Large numbers of people were assembling at Schlosser, the nearest landing place and port to Navy Island. Is it remarkable that one of our countrymen, especially one of our eastern brethren, should see an opportunity of gain under these circumstances? This was the fact, and Mr. Wells saw in the circumstance of the excitement and curiosity which were drawing thousands to Schlosser—of whom not one in a thousand went to the island—he saw an opportunity of making gains by his little boat, which was hardly larger than a ferry boat, and which was lying idle at Buffalo. With this, and no other motive than that of profit, he started from Buffalo, on the 28th of December, 1837, to Schlosser. He stopped at all the intermediate points or landing places where boats had theretofore stopped. After reaching Schlosser, about 2 o'clock in the day, he went

from there to Navy Island; he made two trips in the course of the afternoon, carrying passengers and such articles as were brought to him to be conveyed, and such as were conveyed by other ferry boats. Among these articles it will appear there was a cannon. Much stress has been laid upon this circumstance, and I therefore pause one moment to comment upon it, so far that you may perceive what force an act of this kind should have. It was one of those articles which, when nations are at war, neutrals are prohibited to convey, under pain of forfeiture if taken. If a neutral undertake to carry arms and munitions of war, the vessel and articles so conveyed are liable to forfeiture. But if a vessel carry such articles to the destined point and land them, she cannot afterwards be held liable. The moment the articles are landed she is no longer liable to be seized or molested. This law applies upon the high seas, the common highway of all nations. In this portion of the territory, it would apply only in cases of seizure within the waters of Great Britain, and it would not extend to them the right of coming within our own waters.

It will be observed that at the same time that this vessel was passing between Navy Island and the American shore, a ferry boat was passing from Black Rock to Waterloo, on the Canada shore daily and hourly, carrying to Canada arms and munitions of war, and the Canadian army were fed at the same time from the American shore. And I go further and say—but I do not in this case say it with pride—it will be found that American citizens were in the ranks of the army embodied upon the Canadian side. But when it is brought up against these people as a charge that their interference was unjust and iniquitous, the charge seems to be unfounded in fact. It seems as a course consistent, when citizens of a neutral power enlist in the ranks of their enemies, that our citizens should be equally ready to enlist in their ranks. Our relations are such that we can interfere neither on one side nor the other. After having performed these trips, this steamboat was moored at Fort Schlosser. Be not deceived. There is no fort there. The old fort is covered with luxuriant corn-

fields. There is no building except a warehouse at the wharf, and a tavern about fifty rods from it, and scarcely a house except at the Falls, for a distance of two miles. At this tavern the hundreds who were flocking there, and were crowding and thronging this place in the evening could not obtain lodgings, and came to the boat. The captain gave them liberty to lodge upon the boat, so far as her accommodations extended. It will appear that some eighteen or twenty went to the boat and took up lodgings. It will also appear that this boat was unarmed, that she had no equipments of her own, nor had she on board any arms, nor were the men on board armed. Nor were those who came on board to lodge that night armed. At 10 o'clock, as will appear, the watch was set, and the inmates retired to their repose, unsuspecting of danger, as they were unconscious of wrong. But about 12 o'clock—the testimony may vary from half-past eleven until one o'clock—the Captain was aroused by the watch, who informed him that boats full of men were approaching, and that the men were coming on board. Presently the noise of tramping and shouting was heard, and the men aroused in this manner from their slumbers, hastily arose, and seizing whatever of their clothing was at hand, they rushed for the companion-way or gangways, to every avenue through which they might escape. Some were fortunate enough to escape with their lives, others were met by armed men, and thrust at with swords and pikes, and severely wounded; yet they were enabled to escape with their lives. It is but too probable that there were still others, who, alarmed at the sudden onset, by the cries and shouts, the clashing of arms and firing of pistols, and cries of no quarter; and apprehensive of being put to death, concealed themselves beneath and around the boiler and other places, and came forth after those ruffians had left the boat, only to meet the rushing flames, and to hear the roar of Niagara. But, gentlemen of the jury, those who had escaped from the boat, found that they had not thereby escaped from danger. Some who had escaped from the attack upon the deck of the vessel, were pursued into the warehouse. And the warehouse was searched with lights to ascertain—in

the language of themselves—if some of the d——d Yankees were not concealed there. Amos Durfee, whose sad fate is the immediate cause of your being impanelled here, was found upon the wharf, some four rods distant from the boat, a ball having been shot through his head, entering the back part, and coming out in front. It had been so near that the cap upon his head was singed with fire from the gun. He had doubtless been shot upon the spot, and died instantly with the wound. It will appear also that the assailants who had committed this bloody deed were some of a band of armed men, between forty and sixty, who had come from the Canadian shore. It will appear before you that it was a secret and voluntary expedition, armed for the purpose of the destruction of the *Caroline*. At that time, gentlemen of the jury, there was on the Canada shore an army of some twenty-five hundred men, who had been collected there on the occasion of the seizure of Navy Island by the insurgents. They were there avowedly for the purpose of repelling any attempt at invasion which might be made by the insurgents. From these circumstances, it has been alleged that the transaction was one more of a military character than civil; that it was a transaction of armed men, acting in an organized manner, and to be governed by laws and rules which do not prevail in courts of justice. Gentlemen, it is but right that your minds should be perfectly embarrassed; I therefore present the case to you broadly, that when the testimony is brought before you, you may see its bearing and application. I will submit the decision of the Supreme Court, given upon the facts in evidence, after able and eloquent arguments on the part of the counsel for the prisoner—given after great deliberation—an opinion which is unanswered and unanswerable. In that opinion, all those questions which might embarrass you, under the ingenuity of counsel, have been entirely disposed of, and the real points which you are to pass upon are distinctly pointed out to you.¹¹

¹¹ *Mr. Hall* here read the opinion of Judge Cowen on the case brought before the Supreme Court of the State. 25 Wend. 596; 26 Wend. 603.

In the first place, the Supreme Court of the State of New York have decided that this was not an act of war—that it was not to be governed by the laws of war, but of peace; not by the laws of Canada nor of the United States; but by our own municipal laws. There is, therefore, no consideration in the case, which would not be brought before you in any case, where an attack has been made and one of our citizens murdered. The law is precisely the same here as in our own municipal laws under which we all live and act and seek protection. There is no justification, or excuse, or palliation. Another point is, to excuse the act on account of its being done in a pressing and dangerous assault. I will add one suggestion; it is this, that the offense which has been committed, is an offense against our laws alone, and no other laws. Blood has been shed upon our soil, and we, the people of the State of New York, are held responsible, and no other people. If the prisoner is not punished here, he will be punished nowhere. Not in Canada. Not under the laws of the United States. He has violated no law of the United States. It is here and here alone that the avenger of blood calls upon you to answer as to the guilt or innocence of the prisoner. I will make another suggestion. Throughout, the Court proceeded to take facts which he states to be true—they presume that Durfee was one of the insurgents in arms against Canada upon Navy Island. They have placed him in the same position as if he were one of the insurgents, or as they would have placed Van Rensselaer himself had he been killed instead of Durfee. This you will perceive is a fallacy. And that the unhappy man who met his death there was as innocent as you are. He was there on his lawful business as you might have been, and had any other citizen been killed in that situation, the facts would have been the same as in the case of the unfortunate Durfee. The only question which you have now to decide is the simple fact, “Is the prisoner one of those who assailed the *Caroline*, and killed Durfee?” To that single fact are you limited. The questions of law have been disposed of by the Supreme Court, by which decision you and this Court and all are bound. You must

bear constantly in mind that the testimony which bears to any other point except whether he was there or not, is to be thrown from your mind as calculated to perplex and embarrass. The question then is, was the prisoner in that expedition? Upon this point we shall examine numerous witnesses; some of them will show that upon various occasions and in presence of those who were in it, the prisoner declared that he was there. We shall show that previous to this expedition the prisoner was one of the most busy and active in getting up this expedition—that a few days previous he went to Buffalo for the purpose of seeing the boat, and of ascertaining if it were coming to Schlosser. He went round the Island in various ways, and appeared to take a deep and active interest in the affair, and we shall show you that he was engaged in enlisting persons for the expedition. It will also appear before you that on several occasions he exhibited a pistol and a sword with blood upon them, and repeatedly pointed to the blood, and said it was the blood of a d—d Yankee. Several witnesses will prove before you that they saw him enter the boat to go on that expedition—again, others saw him leave the boat on its return. Such, gentlemen, is the nature of the evidence which will be adduced on the part of the prosecution to show what part the prisoner had in this expedition—the destruction of the *Caroline*, in which Durfee met his death. Little now remains for me but to lay down some principles of law, that you may judge of the weight and application of evidence, which shall be given in before you. Having stripped the case of all extraneous law and all foreign law, we are to try the case according to our law as it is administered in England, the government of which the prisoner was a subject. The first thing is, that every murder is presumed to be malicious. It is for the accused to show, that there was cause of excuse. When one man meets his death by the hand of another, it is presumed to be a murderous act, unless the other can show that it was done by authority of law, as in the case of a sheriff, or in necessary self-defense, as when assailed by a robber; or some excuse or justification of this kind, to excuse the person whose hands are marked

with the blood of the person whom he has slain. The second proposition, that malice is necessary to constitute murder, is confined to an intention to take the life of an individual, the malice prepense essential to constitute murder, consists in a foul design under the dictates of a depraved, wicked, and malicious heart. It is not necessary for you to say, that the hands of the prisoner were the hands that slew Durfee. The third proposition is: If an action be unlawful, and its deliberate intention is mischief indiscriminately, and death ensues besides the original intent, it will be murder—no matter whether they intended to kill when they left Canada, if they were bent on an act of villany, they must take the consequences. The fourth proposition is, that, in order to convict the prisoner, it is not necessary to prove that the fatal wound was given by his own hand. If he was present, aiding and abetting, he is a principal in the felony. If several persons set out together, or in small parties, as several boats starting from Canada upon one common design, be it for the purpose of murder or for other felony—for the purpose of murdering Durfee or destroying the Caroline, or any other object, some being employed to watch, some to prevent the escape of those who are more immediately engaged—they are all, in the eye of the law, present at the act committed. These are the principles admitted; they are the known rules of law, and it is only for you to apply to these principles the evidence which shall be adduced. And if the evidence brings the prisoner within the province of the law, there is no alternative but to pronounce the verdict which your oaths will require. Before you will be called upon to find a verdict of guilty, the following facts must be established. First, that Durfee was killed; secondly, that he was killed in the county of Niagara; thirdly, that he was killed by a pistol or musket shot, or a weapon of a similar character; fourthly, that he was killed by the prisoner; or fifthly, that he was killed by the prisoner or others connected with him, with whom he was acting, counselling, aiding and abetting. If this act was done by him or by the company, your verdict of guilty must follow.

Gentlemen, I have endeavored to place before you, in the most simple manner, the leading features of this case, so far as they may be useful to you, and no further, in understanding and applying the evidence as presented to you. The interests which are committed to you are of inexpressible importance to the prisoner, whose life is in your hands; to the People—for they have committed to you the vindication of the laws upon which all our lives depend. If the prisoner be proved guilty, and you find him innocent, you sap the foundations of government, by destroying the confidence of the people in the administration of justice. Why is it that our ears are so often shocked with accounts of deeds of villany and bloodshed? Why the assembling together of men without law or the form of a trial, assuming to themselves the right to take the lives of offenders? It is because courts and juries have failed to execute the laws. The people have lost confidence in the regular administration of justice. Gentlemen, this trial must necessarily be long, tedious and painful. Let me urge upon you to arm yourselves with patience, as you would consult your own future peace. This trial will be an epoch in your lives. You will think of it at your firesides, upon your farms, by the wayside, in the long, sleepless watches of the night, in the last dread hour of review, when your past lives rise up before you—as dark and forgotten things are suddenly illuminated by light from eternity, this will stand out as one of your most important acts and greatest responsibilities. But if through fear, favor, or partiality, or from any other weakness—if through an overlooking of the law and testimony, which you are bound to observe by your solemn oaths—if by any assumption of that power to decide upon the expediency of a trial and conviction, a power which belongs to the executive alone and not the judiciary—if through vain and presumptuous attempts to overlook the cause and weigh the consequences—if from any or all of these causes you fail to vindicate the confidence which the law has reposed in you, you will then, at the last hour, bitterly but vainly regret it. Gentlemen, I have but one word to say; it is, that throughout this trial, in every stage of it, you are to keep fixed before you, as if written in letters of fire—Be just and fear not.

THE WITNESSES FOR THE PEOPLE.

William Wells. Was born and reside in Buffalo. In 1837 owned the Steamboat *Caroline*. On 29th December I ran her to Schlosser, arrived there about 6 in the evening and made her fast with a chain cable to a pile at the end of the dock. As soon as we got our suppers, we set our watch and went to bed. Sylvanus Stearing was one of the watch that night; do not recollect the others. About 12 o'clock was awoke by some of the hands who had been to Niagara Falls, come back and finding their berths occupied by strangers, they called me up, and I directed the strangers to get up and give my hands their berths. While on deck one of the hands told me he saw a boat approaching; told him to look after it and see who was in it, but allow no one to come on board; then went to the cabin and got in bed again, presently the watch came down and told me there were four or five boats, filled with armed men; before I could get my clothes on heard people on deck making a great noise, and also heard the report of several guns or pistols on deck; could not distinguish what was said; concluded that the people who had come on board wanted to get possession of the boat; and knowing I could not resist them I dressed myself, secured my papers and made for the companion way. Before I got to the stairs which would take me on deck, I heard orders given to give no quarters, to kill the damned Yankees, or words to that effect; became alarmed, and asked Capt. Appleby, who was with me, what

we should do? He replied we must do the best we can.

Capt. Appleby was in advance and had just put his foot on deck; he was seized by the collar by some person, who told him not to go out there, or they would kill him. Two parties of men, one coming from the bow of the boat and the other from the stern; met by the cabin door, which they closed; heard swords clashing and firing. Capt. Appleby and myself then returned into the cabin; I turned to escape from the forward hatchway, when a man put his hand upon the hatchway, and sprung down into the fire room without touching the plank; he immediately caught hold of the poker, and commenced working at the fire, as I supposed for the purpose of getting up steam and taking the boat off; stood there, not daring to make a noise, till he got busily engaged; when I crawled back into the cabin without his hearing me, to escape through the cabin door; met some one who ran against me; supposed him to be one of the attacking party. We spoke and each passed on. When I got to the fire room, the man who first entered still sat there. He soon rose, seized some one who had secreted himself there, hauled him out to the light, and in rough language asked him who he was and what he was doing there; saw it was Amos Durfee whom he had seized. Durfee replied that he belonged to the boat; did not then know his name was Durfee, but only knew him as a stage driver. The other then used very opprobrious language

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to him, and keeping hold of him, ordered him to follow him on deck or he would blow his brains out. They both went upon deck.

Intended at first to go up and surrender, but from the treatment I saw Durfee receive, concluded I had better not. Saw through the port holes a yawl with men in it armed with boarding pikes, etc., who had just thrown the painter on board the steamboat, and made it fast; and their boat was swimming round with the current. Discovered two yawl boats made fast to the stern of the steamboat, with a man in each; felt the boat move from the wharf. I ran up the stairs, and while doing so, felt the boat strike the wharf again; placed my hand upon the railing to let myself upon the dock, when one of the three men came upon and seized me, saying, hello, do you belong to the boat? I answered, no, I do not—I belong ashore. Their attention was directed by a pistol that was fired behind them, and I stepped off upon the dock, got behind the wheel house in which they could not see me, and so effected my escape from the wharf; saw a man lying about four feet from the edge of the wharf, with his head to the boat. The next morning I saw Durfee lying on his face, dead, in the same spot where I saw the man lying the night before. His head was shattered. He appeared to have a ball fired through his head from rear to front, coming out at his forehead. The number of assailants was between 40 and 50. They came in five yawl boats each of which would carry 8 or 10 comfortably. The men on watch on the steamboat were not

armed, nor was any person who was on board. The crew consisted of ten, and there were 23 sleeping on board. They had arrived too late for the cars, and the public houses being overflowing, I provided them with lodgings to accommodate them; had intended to run up to Black Rock Bend that night, and had invited a few friends to go with me, and they were also on board. Schlosser is about two miles above Niagara Falls, in the town and county of Niagara. Of all on board, 6 or 7 were missing in the morning, and as many as 7 have never since been heard of.

King was very severely wounded on the right shoulder, and his left arm, and his clothes were full of blood and cut in many places where the flesh was not reached. Several others were slightly wounded. John Leonard received a blow on the forehead with a blunt weapon. Capt. Harding had a severe cut through his cap into his head, breaking the skull.

My object in running my boat from Buffalo and intermediate places on both shores, was to make money conveying passengers and freight—touching at Grand Island, Tonawanda, Navy Island, and stopping at Schlosser. On the day before she was destroyed, she had made two such trips, but little besides was carried on that day. But little freight was offered to Navy Island, and none from it. On that day Captain Appleby acted for me. Neither I nor my boat had any connection with the Navy Islanders, whatever.

Do not think it was Durfee whom I saw lying on the dock in the night. I think I heard as

many as 40 or 50 shots fired during the attack on the boat. No swords were in the possession of anybody on board my boat, to my knowledge.

Cross-examined. When I left Buffalo had two whom I had a right to call hands—one my brother-in-law, King, the other was a black boy; never found more than one person who was killed in the attack; do not know the names of any of the missing. The Caroline was sold in the summer; I became purchaser and sole owner. There was an understanding between Mr. Scranton and myself, that when navigation opened in the spring he was to be entitled to become a joint purchaser. There never was a bond of indemnity given me for running to Navy Island. There was some conversation about giving me a bond to indemnify me for damage to the boat in consequence of running to Navy Island; but I never had an intention to receive such a bond—never knew who was to give it, and never heard of its completion.

But little freight was taken on board at Buffalo that day. There was one cask containing heavy articles, and some other articles I do not remember; do not think there were more than half a dozen passengers from Buffalo; saw no arms upon any person except one man on board had a rifle, with which he shot ducks on the passage; do not recollect of taking in any freight at Black Rock Bend, and but about half a dozen people; saw no arms with any of them, except the rifle before named. There was an old sword lying about the boat somewhere. It

was the first trip I had ever made in her, and my attention was mostly taken up with the machinery, etc., of the boat; have petitioned the government for compensation for the loss of my boat, and I have been examined by officers of the government on the subject. My intention was to run between Schlosser and Navy Island as long as would be profitable; have never understood that if my boat was used to convey munitions, etc., to the Navy Islanders, Government would not allow me compensation for her loss.

Among the articles I took that day from Schlosser to the Island was a six-pounder, some lumber, straw, a horse, etc., which I left at the Island. Some muskets also went over—perhaps 10 or 15—there might have been more—maybe a hundred. Also some articles of provisions. I was informed the Navy Islanders would in the course of a week leave the Island, come to this side, and disperse.

Never had any idea that they would go into Canada; on the 26th I visited Navy Island, saw about 250 persons there, eleven pieces of cannon, some mounted and pointed toward both shores; I do not know who had command at that time, but understood it was Van Rensselaer; I do not know that there had at that time been any firing either to or from Navy Island; received some \$10 for freight on the last day my boat ran between Schlosser and the Island; did not receive regular freight on that day; I know of no firing between the Island and the Canada shore on that day; saw persons on the Island with whom I conversed about

running her to the Island; I saw Van Rensselaer, Dr. Chapin and Mr. Flagg. They requested me to come there with her, and said I could make money by it; do not recollect that they said anything about giving me a bond of indemnity nor that they referred me to the committee of thirteen at Buffalo. I do not know that I had any conversation with any of that committee about a bond; have understood that a committee had a Commissary named Phelps, and a cashier whose name I did not know; bought her on the 1st of December, 1837; she was cut out of the ice on the 28th, and destroyed on the 29th.

Know the time when the band that took possession of Navy Island left Buffalo. They had a meeting at the Theatre a day or two before, which I attended. The avowed object of the meeting was to sympathize with the Canadians. Mr. Mackenzie addressed the meeting. I do not know who else spoke. I understood that the object in taking possession of Navy Island, was to concentrate there, and free Canada; was not in their secrets, however, and cannot speak from knowledge; never had any idea, however, they would free Canada.

Never had any connection whatever with any associations or matters of that sort connected with the Canadian insurrection. My object in running my boat to the Island was my own gain, and the accommodation of the public at Buffalo as well as at the Island. It was an experiment I took up in good faith, uninfluenced by any other consideration than my own pecuniary benefit. A great many went from

Buffalo to Navy Island and returned in my boat; brought back more than I took to the Island. The Collector told me I might go to Navy Island and carry anything—arms, ammunition, or anything else to Navy Island for freight. He gave me my papers readily and interposed no objection to anything I had on board.

October 5.

Daniel J. Stewart. In December, 1837, I resided in Buffalo; knew the steamboat *Caroline*. Was on board of her at Schlosser 29th December, 1837. We left Buffalo about 8 o'clock and arrived at Schlosser about 2 o'clock; made fast to the dock for the night with the bow upstream. At one in the night was called to take my post as a watch on deck. About half an hour after (Capt Kennedy was on the watch with me), one of us discovered boats nearing us. My first impression was that they were Indians. Capt. Kennedy called them up from below. A few minutes before a man by the name of Nichols came on board, and remained on deck. He hailed them, asking, "Who comes there?" or something like it. The answer was, "Friends!"

They appeared then to spring on their oars, and approach the steamboat; ran aft to see who they were; the officer of the boat got on board our boat over the rail; he had his sword drawn and stood in an attitude as if he was going to strike me. He ordered his men on deck; then discovered several other men in the act of getting on deck from the boats; then passed aft to alarm those who had not taken the alarm; but they had heard the noise, and had got up or were

getting up; left the cabin and went ashore. I was not armed, nor did I use any weapon. Neither Kennedy nor Nichols were armed, nor did they discharge any firearms to my knowledge; saw no arms among either the crew or those lodging on board, and I have no knowledge of any arms on board, nor resistance, nor preparation for resistance. No attack was expected; it is always customary to set a night watch on steamboats. I heard firearms discharged in the forward part of boat. Did not see Durfee till I saw him dead the next morning. I had seen him on board the evening before. Saw four or five boats approaching the Caroline. Remained in sight of the boat, above the railroad, till the Caroline left the wharf. After she had been loosened from the wharf she was towed into the stream by row boats. Did not see the Caroline ground after leaving the wharf. When the row boats got her into the stream they cast off and made for the Canada shore.

When I came out of the ladies' cabin, heard the officer of the first boat, give orders to "Guard the gangway, and show the damned rebels no quarters." Saw no firing from the warehouse. I heard clashings of swords on board, as well as firing.

James Field. Lived at Schlosser in December, 1837. Kept a public house there. Recollect the destruction of the Caroline. Was awoke by the alarm and got up. About 1 o'clock at night went to the wharf and found Durfee lying there dead. A ball appeared shot through his head, from

rear to front, coming out about the middle of the forehead.

Cross-examined. There was a good deal of passing and repassing after Navy Island was invaded. They were carrying men and munitions there daily—a good many pieces of artillery were taken over.

Frederick Emmons. On night the Caroline was burned was staying at my brother-in-law's, Fielding's Inn. Was roused from bed and went out and saw Durfee lying on the wharf dead. Helped to get the Caroline out of Buffalo; supposed she was to take passengers to Schlosser. Lots of people went there those days. The railroad could not carry them all. The report was that the Canadians were going to invade and they wanted to see.

John C. Haggarty. Reside at Buffalo. Was on board the Caroline when she was attacked and destroyed. I was in bed when the watch gave the alarm. Was a passenger on board the Caroline—not a paying passenger. It is a custom among sailing men not to pay passage to each other. We call one another "dead heads." If necessary we take hold and help. Kennedy, one of the watch, came to the door of the ladies' cabin, where myself and others were sleeping, and told us if we did not get up we would be hurried up. We got up, and went out; I saw a boat with 10 or 12 armed men in her. Three pistols were fired from the yawl at myself and two others, who were near me. One of them—I do not know who he was—fell, and Mr. Leonard, who was by me, and myself started off. I made for the gangway on the starboard side, where I was met

by men armed with cutlasses, who opposed me and would not let me pass. Ran aft again, and there saw still lying, the man who fell upon the first fire. Returned forward, and when I got to the fo'castle heard swords clashing and pistols firing. I supposed at the time that the parties I had met on the boarding on opposite sides of the boat had come together and were fighting among themselves. Succeeded in getting ashore, and through the storehouse off the dock. Afterwards I saw Durfee lying dead on the dock. I had been, with four others, down to the Falls to get lodgings, but not succeeding, returned to the boat and went to bed there. Had in my pocket an unloaded pocket pistol, with a three-inch barrel. Know of no other arms on board.

Henry Emmons. Was at Schlosser on the night the Caroline was attacked—abed and asleep, and was aroused by an alarm that the Caroline was attacked. Got out into the main road soon, and heard firing of guns or pistols. Remained out till the attacking party left the Caroline in the stream, where she was burning. After setting the Caroline on fire, the attacking party got into their boats, and rowed up toward the warehouse, which, together with the public house, we expected they would attack; but they did not. They went back to the Caroline, took her in tow, and carried her into the stream. Saw Durfee lying dead on the wharf, probably 12 feet from the edge of it. There was but one gun in the house, which was fired in the direction the Caroline then was. The ball could not have passed within 10

rods of where Durfee was found lying.

John Hatter. Reside in Niagara County, and on the night of the destruction of the Caroline was at Field's house in Schlosser. The gun that was fired near the house of Capt. Keeler was loaded with powder only. It was fired merely to scare the people who were taking off the Caroline. There was no other gun fired.

John A. Smith. Was on board the Caroline when she was attacked—was in the ladies' cabin—had not been asleep. Went out and saw the boat coming—looked there—saw the men coming aboard—a gun was fired, and some one fell at my feet—was somewhat frightened. Went out by the larboard gangway then. Had no arms—none were armed on board the steamboat. Saw no men or boats near the dock when I went off. Went on board the steamboat at Black Rock dam—hadn't been down before that winter—didn't know whether the man who fell was one of the assailants or not. Was a dead-head passenger.

James H. King. Was the mate of the Caroline—was on board when she was attacked. Retired to the cabin about 8; was woke by the firing of a gun; started out; was met by the Canadians, who were armed; drove me back with swords; they "banged" me considerable, and asked me a great many questions; they cut my arm; more than one struck at me; there were five or six; the lowness of the ceiling prevented them from using their swords much, and I used a blanket as a shield; there was great noise and clashing of arms; no shooting;

they said, when they came in, "roll over, you d—d Yankee son of a b—h, and give us these mattresses!" They threw out the bedding; took a large basket, put a lamp in it and some sticks, and set all on fire; previous to my going out of the cabin one of them said, "What will we do with this fellow?" "Kill him!" said another. "No! take him prisoner," said a third. An officer said, "we don't want prisoners, let him go ashore."

Gilman Appleby. Was on board the Caroline on the night of the attack. Was awake by the alarm of the watch on deck about 12 o'clock. Put on boots and pantaloons, went to the companion-way; only one person could pass there at a time; the stairs are winding; attempted to ascend the stairs; Capt. Harding and others were there going out, and prevented my egress some minutes; heard something like "Show the d—d Yankee rebels no quarter," and cries of "Fire! fire!" Opened the door a very little; a man sprang at the door and made a rush with a short sword; the sword struck my breast; it glanced along two of the vest buttons and struck a metallic button on the pantaloons; fell back and had the lights put out; was fearful that the attacking party would descend and thought they couldn't get on so well in the dark; got up through the engine to the upper deck; there was no one on the deck then; below there was considerable noise; heard a man say, "D—n it, what became of the six-pounder that was there?" the man was on the dock; some one said, "Fetch the light and we may

find some rebels there," meaning the warehouse; then jumped into the water; as I rose to the surface some one struck me on the back, and I worked along till I got ashore, and made for the tavern; saw the man that gave the blow with a sword in the cabin; there was a lamp at the head of the companion stairs—the lamp was a couple of feet from the door, and so high that a man could just clear it going out; then supposed the man to be Mr. McLeod, the man there (pointing to the prisoner); had seen him once before, when I had an introduction to him at the Eagle Tavern, Buffalo; was not well acquainted with McLeod. Knew Durfee; saw his dead body on the wharf.

Cross-examined. The transaction I speak of was done in a twinkling; did not mark the features at the time; it was only a supposition. Do not now swear that it was McLeod.

Samuel Drown. Reside in Canandaigua; recollect the destruction of the Caroline; was then at Chippewa, tending bar for Mr. Smith; had previously known the prisoner. McLeod then lived at Niagara; saw him once a week or so; his business was deputy sheriff of that district; it is about 20 miles from Chippewa to Niagara; saw McLeod in Chippewa the day of the destruction of the Caroline; saw him only once; it was when the rails were burning as a beacon light up Chippewa Creek. Saw two or three of the boats return from the Caroline; the boats went towards the cut; three boats landed; was near by when the men in them got ashore; McLeod was one of these men. Was

within 10 feet of the men. They were talking about the burning of the Caroline; they went towards Davis' tavern; saw McLeod there; a man I called McLeod; do not think I am mistaken about him; was then about 10 feet off McLeod; McLeod stood about 10 feet from the platform.

The *Attorney-General*. Did you hear him speak? There was a good deal of talk. How sure were you that it was McLeod? As sure, sir, as I see him sitting there now before me. When did you next see him? About daylight or sunrise. Some men came into Smith's tavern and said, "McLeod was on the steps and was wounded last night." I said he wasn't, and went out and looked over to Davis' and saw McLeod standing on the platform in front of the door. McLeod had a belt round him and a sword hanging at his side.

Isaac P. Corson. Reside at Niagara Falls; am a master builder; lived at Chippewa in '33 until '38; recollect the destruction of the Caroline; know the prisoner; have known him since 1833; saw him in Chippewa, at Macklem's store, about 3 o'clock of the afternoon before the burning of the Caroline; Capt. Drew, Mosier, Usher and others were with him; they were taking liquor ashore; McLeod remained a very short time, and walked out; they asked me to retire, as they had some private business; saw McLeod again about 9 in the evening come out of the bar room door; there was one man behind him; saw him next after that in the morning on the stoop at Mr. Davis'; did not see whether he was armed; there was a crowd

round him; he was telling of his exploits on the boat; the performance he did in the Caroline; he was saying, "They would not wish to see him there again, as he had put one d—d Yankee or two out of the way;" there were others who boasted of having been in the expedition; none of them disputed the truth of McLeod's assertions; saw McLeod a day or two afterwards coming up from the point at the creek; he had a spy glass; he then spoke of the Yankees as rebels and robbers, and he would like to be on just such another expedition as the Caroline, and set out and burn Buffalo.

October 6.

Charles Parke. Am a native of Canada; was tending bar for Mr. Davis in Chippewa at the time of the destruction of the Caroline. It was first discovered that any one was on Navy Island, on a Sunday. Know the prisoner, McLeod; have known him a greater portion of the time he held the office of deputy sheriff of Niagara District. During the afternoon preceding the destruction of the Caroline, saw him at Chippewa. Saw him also after dark. A gentleman inquired for him between 8 and 10 o'clock; McLeod got up, dressed, came down into the barroom and told Mr. Davis that if his, McLeod's, brother inquired for him, to say that he had gone to Niagara. About half an hour after, saw him again, between Davis' and the Chippewa Cut. There were a number of people about and near him. After that, saw him, and some hundred more by the side of some boats on the bank of the river. Some got into the boats, but afterwards they

got out, and towed the boat about three quarters of a mile, where they embarked on board the boats, and shoved off from the shore. They steered across the river; do not know where they went. Returned home and went to bed, leaving up Mr. Johnson, a bartender, in the house. Have not seen Mr. Johnson lately; understand he is at Detroit. Next I saw of McLeod was about sunrise the next morning, on the square in front of Mr. Davis' house. There were a number of people not far from him, but none very near him, nor do I know that any one was in his company. The previous evening he wore a sword by his side. Did not hear him say anything. Saw him again, in the forenoon, while I was standing on Mr. Davis' stoop. Afterwards I was in the habit of seeing him frequently; almost every day. A number of officers boarded there. Have heard him say something about the destruction of the Caroline. A few days after a number of them were conversing about it; Capt. Stennett was one, Maj. Cochran of Dragoons, another, and four or five more; and McLeod said that he had killed a Yankee. Their conversation was in reference to the Caroline. Can speak quite positive about McLeod's getting into the boat.

Cross-examined. Saw McLeod when he was taken up at Niagara Falls in December. Did not tell anybody there what I knew. Kept it to myself as was not in the habit of speaking of such things. There were a lot of people around the prisoner the morning I saw him. Think Mr. Caswell was one. He is here as a witness. It first struck me

this moment that Caswell was there. We have talked about it. Cannot say which of us spoke first of seeing McLeod. Caswell told me he was there.

Henry Meyers. Live near Canandaigua; work on a farm; once resided in Canada; am a citizen of the United States by birth. Went to Canada seven years ago and came back eight or ten days after the Caroline was burned; not been there since. Have seen the prisoner before this trial; returned from Canada shortly after the Caroline was burnt; saw the prisoner twice in Canada, once at St. David's, and when I moved out of Canada, at Niagara; saw him on the latter occasion in a tavern. Saw there a number of soldiers; some had weapons, some had not. There was some talk about the man that shot Durfee; one said, "Where's the man?" McLeod said, "Here he is—I'm the man!" He pulled out a horseman's pistol and said it was the pistol that shot him. Then he pulled out his sword, and said, "There's the blood of a d—d Yankee!"—holding on the sword. There was blood on the sword. They asked me where I was going; replied I was going to Geneva, as my wife didn't like Canada; some of them said I was a d—d Yankee, and McLeod said I was a d—d rebel and shouldn't go any farther. At last McLeod said if I was a mind to treat the company I might go home; said I wouldn't mind doing that; then went into the barroom and treated to the amount of a dollar; then was allowed to go and proceeded on my journey.

Cross-examined. Heard prisoner's name called under the

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shed. Some one called him "Sandy McLeod;" another said, "Alexander McLeod, is it best to let him go or not?" McLeod said, "If he'll treat, he may go."

Calvin Wilson. Reside in the county of Niagara; know the prisoner; owned and kept the ferry across Niagara, called Youngstown Ferry; saw prisoner between the 5th and 15th of January, 1838, in a public house kept by James Miller in the town of Niagara; there was a number of people with him; knew a young man of the name of Reyncock; also saw Mr. Miller; saw John Mozier there; also a young man named Meredith, and a young man named Elmsley; they were in a sitting room in a public house; heard them conversing; the subject was brought up by Raincock in reference to the Caroline affair which had taken place a few days before; he wished to know how many had been killed; McLeod replied that he thought there wasn't more than three or four; and he didn't know but five might have been and one thing he did know, he said, there was one d—d Yankee rebel shot on the wharf; he said something else which I did not understand; Mozier didn't say anything; Elmsly did not say anything that I recollect; have stated correctly what the prisoner said; the very words, or very nearly; recognize prisoner at the bar as the person who used said words.

Cross-examined. Have taken some interest in the Canadian movement; did not belong to a patriot lodge. Have aided the refugees with money. Decline to say if I have protected and entertained Benjamin Lett.

Elijah D. Effner. Reside in Buffalo; recollect the Caroline; was on board of her at Schlosser. The accommodations being poor at Schlosser, applied on board for lodgings between 2 and 4 of the afternoon preceding her destruction. Went through her; found no arms, and asked the people on board how they expected to defend themselves if attacked. Said they were a ferry boat, and not allowed to carry arms. Was a marshal deputed specially to preserve the peace, at that time. Saw some persons come aboard with arms in their hands. They were strangers, not Americans; they told me they were from Lower Canada. They wore Canadian caps.

Seth Hinman. Reside at Youngstown. Was in Chippewa in December, 1837, working at the joiner business, at the time the Caroline was destroyed, and know the prisoner; had seen him at Youngstown and Chippewa both before and after that event. Between 7 and 9 of the evening preceding the burning of the Caroline, saw him in Davis' barroom at Chippewa; there were a number in the room; he passed through the room and went out; don't know that any one was with him; others passed in and out; cannot say that he was armed. I did not see him again till about or a little before sunrise the next morning, near Davis' tavern; did not hear him say anything, nor did I observe whether he was armed.

Charles Yates. Reside in Clarkson, Monroe County. At the time of the burning of the Caroline lived in Canada, about 100 miles below Toronto. Don't know I ever saw McLeod to know

him till at Niagara jail, at Lockport, last April. Have been at Queenstown several times; during the winter of 1839. Was in a public house there, and there were several others there; some went up to the bar and drank; one said, "This is something like the night after the burning of the Caroline." Another replied, "Yes, we gave them Alec; I should like another job just like it." Cannot say that McLeod was one of those persons, but somebody whom I did not know told me he was McLeod.

William W. Caswell. Lived at Chippewa in 1837; remember the burning of the Caroline; had known McLeod two years before that event. About 9 the evening before the Caroline was burned, saw McLeod at Chippewa, between Davis' tavern and Macklin's store. He was going toward the store; did not see him again that night, nor did I see the expedition against the Caroline start. Saw McLeod about 7 o'clock next morning, near sunrise, on Davis' stoop. He came from the direction of Davis' barn, which adjoins the house. Heard him talking with a number of others. I heard him say the taking of the Caroline was handsomely done; that "we made the damned rebels run when we came," and he and others, who appeared to have been in the expedition, went on and told what part they had taken in the expedition. McLeod had a large pistol in his hand, by the muzzle. It is three miles from Chippewa to Schlosser; the passage can be made in a rowboat in 20 minutes. McLeod or some one of the company said they had left one man lying dead on the dock, and that he would nev-

er come back to annoy them any more.

Anson D. Quimby. Reside at Columbus, Pennsylvania. In December, 1837, resided some two miles from Chippewa village. Recollect the destruction of the Caroline. At that time knew Alexander McLeod, but not intimately. On the evening before the burning, I saw him at Davis' tavern, Chippewa, about 8 o'clock. He was coming out of the barroom as I was going in. Did not see where he went to. The next morning, not far from sunrise, saw him again, not far from the end of the bridge that crosses Chippewa creek. Some of the Coburg troop were with him; did not know them personally. Some one came across the bridge and asked, "How did you make it go last night?" McLeod said they "made it go very well." He added that he, or me, I am not certain which, "killed some of the damned Yankees," and added that he had Yankee blood on his sleeves. He held up his arms; did not see any blood. Heard no more, but passed on. Do not know that I saw him on any other occasion.

Cross-examined. The Patriot War was my reason for leaving Canada. The day the Caroline was burned was in Chippewa with some hay, which I sold to the government. Went early to the Commissioner to get my money.

Justus F. P. Stephens. Reside in Gaines, Orleans County. Was in Canada on the night of the destruction of the Caroline; know McLeod and saw him at Chippewa on that evening; have known prisoner since fall of 1835; have never conversed with

him since that night; it was between 10 and 11 o'clock that night I saw him; he was very near Niagara River, near a canal, or race, some 15 rods from the head of the race; he was there with a number of others; they were about getting into some boats; they entered the boats and went off.

Mr. Hall. Did you see the prisoner get into a boat; am positive I did. How near were you to him? I was within five or six feet. Were the men armed? Part were armed I know—it may be that all were not. Was the prisoner armed? He wore a sword. Well, what then. After getting into the boat they put off from the spot I first saw them, went out of the head of the cut, and put out and up the river. How many boats did you see? I saw but three.

The COURT. Did the prisoner go off with the boats? He went off in the boat he entered.

Mr. Hall. When and where did you see the prisoner next? About five hours after, and about 3 o'clock in the morning, the boat came back, and landed a little above the cut, where there were a number of rails burning. McLeod and some others got out of the boats there, and went across to a tavern kept by a man named Davis, I believe.

To the COURT. They disembarked four or five rods above the head of the cut. I am not positive that all disembarked there—I saw three boats return—the same number that returned.

Mr. Hall. The witness is with you, Mr. Spencer.

Mr. Spencer. I have nothing to ask him—nothing—no.

Mr. Hall called to the stand *Seth C. Hawley*, for the purpose of proving that *Mr. Johnson*, spoken of by several witnesses, was at the time of the destruction of the *Caroline*, a barkeeper at *Davis' tavern*, at *Chippewa*, at present residing at *Michigan*; that every proper effort had been made by him (*Mr. Hall*) to procure his attendance at this trial, as his testimony would obviously be important; but that, being out of the jurisdiction of this court; his attendance could not be compelled. *Mr. Hall* did not wish this explanation formally made for his own sake; but, unexplained the opposing counsel might make use of the absence of this important witness, in his argument to the jury, to the prejudice of the prosecution.

Mr. Spencer said he should not so use it, as he readily acknowledged the Attorney General had used every reasonable exertion to get together witnesses for the prosecution; and the COURT deeming the explanation unessential, it was not gone into.

Mr. Woods stated that there were urgent reasons which impelled him to solicit leave of absence during the remainder of the trial, and *Mr. Hall*, after complimenting *Mr. Woods* on account of his able assistance, expressed his readiness to join in that gentlemen's request.

The COURT acceded to the application of *Mr. Woods*.

Leonard Anson. Reside at *Niagara Falls*; was in *Chippewa* in *December, 1837*; remember the burning of the *Caroline*; was at *Smith's house* during the attack; remained in the house till morning; saw *McLeod* there in

the morning—knew him personally; he was well known there as Deputy Sheriff; there were a number of people in the bar room who were talking of the expedition, and who had done the greatest deed; the persons spoke as if they had been in the expedition; heard McLeod say, we killed one d—d Yankee, and here's the blood. Heard nothing else particular said; there was a

kind of dispute amongst them who had done the greatest deed, but none of them dissented from what McLeod said; stayed there some time; knew of the destruction of the *Caroline* before that morning; knew it the night before; the sentinel told him; was driving a team at the time of the outbreak; am now employed by Mr. Porter.

MR. SPENCER'S OPENING FOR THE PRISONER.

Mr. Spencer. Gentlemen of the Jury: I will endeavor to open this defense in the manner which has just been suggested by His Honor, because it is precisely the way in which every defense should be opened, and from which the jury can best appreciate the evidence to be brought before them. I need scarcely say, that this is a case of no ordinary character and importance. It is the first of the kind you have ever tried, or in all probability will be again called on to investigate. A solemn duty has devolved upon you, and I have not the smallest doubt that it will be fully and faithfully discharged. The defense which we intend to make is two-fold, and I will place it before you in its double aspect, thus early, in order that the Court may be prepared to direct our conduct of the case as it may think proper. In the first place, then, we will inquire whether any murder has been committed at all by anybody; and secondly, whether, if that question be answered in the affirmative, Alexander McLeod was one of the murderers. The first portion of our defense we shall conduct with all deference to the opinion of the Supreme Court, which the learned Attorney-General referred to so fully in his opening. We are no strangers to that opinion, nor to the questions presented in the argument which drew forth that opinion: and if the learned gentleman opposite really supposes, as he said, that the counsel of the prisoner sustained a rebuke when that opinion was delivered, I avail myself of this early opportunity to say, that the counsel have never felt the justice of that re-

buke, and it yet remains to be shown that that opinion administered any just rebuke. There are some things in that opinion, which, when I first heard them within this very circle, fell upon my ear as a little strange; but there is also very much of that opinion to which I listened with great pleasure. That document is ably written: it contains the evidences of great research and profound legal learning, and it may present the sound law of the case. But whether it be the sound law of the case or not, and whether the learned Judge who now presides on this trial will so regard it, I know not, but I feel bound to conduct this case on the broad grounds of what I consider the true principles of the law as applicable to it. We shall then, in the first place, after a few more facts shall have been made to appear in evidence before you, insist that there can be no such offense as that of murder proved as growing out of the destruction of the steamboat *Caroline*. And here allow me to say, that in the whole course of my reading—limited, I admit, it has been—I never knew of a similar case. It is now for the first time that we see an individual acting under the authority and by the orders of the government whose subject he was, having been put on trial for obeying those orders. This is indeed a remarkable occurrence, almost at the end of the first half of the 19th century! As the counsel of Alexander McLeod then, I shall have occasion to contend that there can be no such thing as murder charged against any of the persons who formed the expedition sent to destroy the *Caroline*. And let me here add, that the question as to whether that act was a justifiable procedure or not on the part of the British Provincial Government cannot be entertained by you. The facts, gentlemen, to be adduced, will show that this party which made the attack upon the *Caroline* consisted of the crews of seven boats, six of them containing eight persons and one containing nine, which were made up of British provincial soldiers then on duty at Chippewa, or British naval officers then on duty at Chippewa; that Colonel McNab ordered the expedition; that he acted under the authority of Sir Francis Bond Head, the provincial governor, who directed

them to seek out and destroy the *Caroline*, which he then believed to be in the employment of the party on Navy Island, who had there raised the standard of revolt, fortified their camp, and opened their batteries on the Canadian shore. When this party was thus circumstanced, and at a season of the year when navigation by any other vessel was extremely perilous, that boat came down for the express purpose of being employed by the occupants of Navy Island, and in their service that boat was from day to day engaged. The boat was then as liable to destruction at Schlosser as if she had been moored at Navy Island, so far as respected individual responsibility. Indeed, it was now proved that Schlosser was the very rendezvous of the party of the invaders of the island, or of those who were continually carried over to the island. We shall contend, then, that the boat, while at Schlosser, was there for as hostile a purpose as if at Navy Island, and that the British authorities were therefore as much justified in destroying her there, as if she had been at the latter place; and I ask every American citizen if he would have regarded the destruction of the boat at Navy Island as an offense? Might not the island have been justifiably invaded, and the persons on it taken prisoners and slaughtered, without the persons so invading it being chargeable with the crime of murder, or any other offense against the laws whatever?—such proceeding being well known to and recognized by the laws of war. Whether the insurgents on the island were right or wrong, is wholly immaterial. Whether the British Government had been tyrannical, and had driven these people to desperation, is wholly immaterial. The Canadian subjects of Great Britain had seen fit to revolt, and, with the aid of American citizens, had made open war in Canada; and whether they were right or wrong, it was a war, and all the rights and immunities that belonged to those engaged in war, pertained to them.

This is the broad ground on which we rest the case. We will show to you, gentlemen, that the federal government of the United States took this view of the case; that they took cognizance of this offense, and demanded reparation from the gov-

ernment of Great Britain, and that at a later day the British government acknowledged the responsibility of that act, and declared that it was done in obedience to the British Provincial Government, and justified it as a necessary act for the protection of the subjects of Great Britain, then living in Canada. The federal government, then, under the constitution, had taken full cognizance of the whole matter embracing not only the invasion of our territory, but also the destruction of the steamboat the property of one of our citizens, and the taking away of the life of another. All, all those considerations were presented to the notice of Great Britain, and our government, mindful of the nation's rights and ready to vindicate them, had demanded full and entire satisfaction for the injury which our country has received. But the individual who formed part of that public force of Great Britain stands excused, as he always must, from all the consequences of his action under those orders. As an individual offender he is not answerable to any tribunal.

Passing from this, I will now take up another branch of the case, in which I am well persuaded the intelligent Judge who presides here and myself shall have no difference of opinion—whatever may be our respective views of the other feature of the case, and that is the point as to whether McLeod had anything to do with this transaction or not. I am willing and I intend to call your attention more minutely to the evidence sustaining that ground of defense, than to that pertaining to the other position which we have assumed; because the evidence sustaining the latter is not in any degree susceptible of dispute. Every word of evidence given on the part of the prosecution has gone to establish our case, and what is yet to come will only confirm what has been shown already. But the point to which I call you now is, that Alexander McLeod had no more to do with the destruction of the *Caroline* or with the killing of *Durfee* than either of you, gentlemen of the jury—not any more. And I speak with knowledge of the facts, and will satisfy you that what I have now said is fully and literally true. I confess that I am somewhat surprised

by the results of this trial which we have yet seen. I anticipated much greater strength on the part of the prosecution. I will say to the Attorney-General, if I am honored with his audience—I will say to his associate that I am astonished at the feebleness of their cause, conducted as it has been with such an array of talent. Without making any extravagant pretensions to that sort of skill in matters of this kind, yet I would venture fearlessly to enter on the argument on the evidence as it is now before you, without the slightest dread of a verdict against my client. But I am not at liberty to play at haphazard in such a case as this. I am here to defend a man whose life is dear to him as yours is to you, and to whom you are bound to give a fair trial, a patient hearing, and a faithful and impartial verdict, just as much as if he were an American citizen. I ask no favor at your hands because he is a foreigner. We expect nothing whatever from your hands on account of the difficulty in which your verdict may place the governments of the two countries. We ask only that you will listen to the evidence, cautiously weigh it, and then pronounce whether Alexander McLeod is a murderer or not. First, then, we will lay before you a mass of evidence taken by commissions, under the orders of the Supreme Court, and which, singular as it is, have been attended to in the execution by gentlemen on both sides. And here let me remark that the opposite counsel have enjoyed all the advantages which a perfect knowledge of our whole case from beginning to end could afford, whilst we have been kept in most profound ignorance of theirs. Yes, had they enclosed their case in the hecatombs of Egypt, it could not have been more religiously concealed from our view. None of the new witnesses, who are relied on to sustain the prosecution, went before the Grand Jury. There may be a few exceptions, but I believe my assertion will be found to be correct. And permit me to add, that in my judgment, if this case were tried as often as the moon changes, new witnesses could be found to prove the case as strong as it has been now presented on this trial. But the commissions have been returned, and the evidence will be read before you. With a great deal of

pains and perseverance, my respected colleague succeeded in finding some men, more or less, who were on board each of the boats which formed the expedition against the *Caroline*. Twelve or so of our witnesses are of this description. First, on the part of the defense, we have Colonel McNab, who proves the issuing of the orders to Captain Drew, the individual who had charge of the expedition. Colonel McNab states that the expedition, when planned, was a profound secret, unknown to any except himself and one or two confidential officers. The party collected on the shore, and went on board the boats, and then the purpose of the expedition was declared, when the party was on its way to accomplish its object. When the expedition returned, Colonel McNab ordered a list of all the men engaged in the expedition to be made out, intending to bestow upon them some mark of approbation for their hardihood and successful conduct of the expedition. And here let me say, that however we may regard this transaction, the Provincial Government of Canada looked on that as a gallant achievement. But whether they rightfully or wrongfully appreciated the undertaking is perfectly indifferent to us. To return, however: in the lists thus made out, the name of McLeod, either Alexander or Angus, does not appear. They refused to give us that list, for very proper reasons, in order that no persons should be exposed by its publication, except who were already well known, or who had voluntarily come forward and avowed themselves. Colonel McNab also says that he was on the shore when the expedition embarked, and that he did not see McLeod, whom he knew most intimately. Then every boat's crew were acquainted with each other, and they respectively testify that McLeod was not among them. And it was surely likely that the members of every little party knew each other. The boat which Drew was in had nine men in it, and he says that on the return of the boat to the Canada shore all the names of the men were taken down, and the name of McLeod is not amongst them. Captain Drew further says that he never heard that McLeod was in that expedition. He says that he knew every man in his boat, and that McLeod

was not in it. Other persons who went in some of the others were also examined, and say that McLeod was not in them. And you and I know, gentlemen of the jury, that those who were going in small boats on an attacking party, to stand or fall together, or be perhaps cast into the current of the Niagara, would be likely to know each other. And when they say that Alexander McLeod was not one of the party, you will believe it. This is in substance the evidence which we have taken on commission, and that will be first laid before you in our defense. You will listen to that reading with attention, although it may not be so satisfactory as the evidence of witnesses who will be before you personally. We shall next have the satisfaction of producing living witnesses, and more than one who will speak of what they themselves knew and what came under their own observation. These witnesses speak of the matter, under circumstances which admitted of no mistake. And we will also show you how easily men can sometimes be mistaken. One of the witnesses (Wilson) will give you a conversation with Raincock about the time of the burning of the *Caroline*. Now we will show you that Raincock left that country in the early part of the year, between the 15th and 20th of June. A respectable man, named Hamilton, who was married in January, 1837, and left Canada for England, and was gone until the fall of 1837, then came back before the outbreak in Canada, and this man Raincock had been then gone so long, that Hamilton was asked had he not seen him while he was in England. With respect to Quinby, we will show you that a short time ago a letter was received by the postmaster here, from a gentleman of respectability in Warren County, Pa., who, hearing of Quinby's intention to come here as a witness, and knowing his character, wrote a warning as to his worthlessness; and acting on this information, I wrote to the worthy citizen there who has come her to speak of Quinby's character. This Quinby, you recollect, is the fellow who sold his load of hay, and went to get payment before daylight of the commissary. We will then show you, gentlemen, that McLeod was at Chippewa, in Davis' tavern, on the

day of the destruction of the *Caroline*; that he went to bed early, as he was fatigued, having been one of the party who rowed round Navy Island. He remained in bed till sundown, when he rose. We will then show you that he went in company with Mr. William Press, then living at Niagara, and now keeping the Hamilton House, in Hamilton, Canada; and in his company McLeod left Davis' tavern, and rode to Stamford, about four miles distant, in a very bad state of the roads, where he got out of his wagon, concluding that he would tarry over night with Capt. John Morrison, a retired British officer in Canada. He left Chippewa in company with Mr. Press after dark on that day. Well, he got out, and went into Capt. Morrison's, and we will show by that gentleman's evidence that McLeod came to his house; that they sat and conversed till about midnight; that they then retired to bed; that he (Capt. Morrison) rose early in the morning, as was his custom; that Mrs. Morrison arose, and their son, a little boy of 15 years of age; that the lad went down to the gate in front of the house; that he saw there two gentlemen, who stopped as they passed, and asked the lad to call his father; that Capt. Morrison went down and there found some one whom I do not now remember, with a Colonel Cameron, who lives at Toronto, and is an elderly gentleman, and is not able to be here, but whom we have examined by commission; that these gentlemen asked Morrison if he had heard the news, and on receiving his reply in the negative, they told him of the burning of the *Caroline*, and gave him as a trophy a fragment of the boat which they had found in an eddy below the Falls. Captain Morrison returned to the house and found Mr. McLeod at his toilet, and to him he told the intelligence he had just received; and McLeod immediately called for his horse, in order to go away, but Mrs. Morrison requested him to wait for breakfast, which he did, and then mounted his horse and rode to Chippewa. Mrs. Morrison, who is an intelligent lady, will tell you, among other circumstances, that McLeod's boots were wet when he arrived there the evening before, and were set near the kitchen fire, and were still there and dry in the

morning. The son will also tell you that he brought the horse out of the stable, and that McLeod went away on it. There is also a step-daughter of Mrs. Morrison's, who did not see McLeod when he first came, but saw him soon after at supper, and also the next morning, and fixes the time beyond all controversy.

To recur to the evidence of Mr. Press. He said he was at Chippewa but once; that he lived at Niagara and kept a public house, and that the day he went to Chippewa was on the 29th December, and that he knows it was that day because he took passengers with him, whose names are in his books, and also the amount, four or five dollars, which they paid him for taking them to Chippewa. He will also tell you that he heard of the destruction of the *Caroline* on the morning of the 29th of December, so that the time will be fixed beyond all dispute.

This evidence takes McLeod from Chippewa the evening of the night on which the *Caroline* was destroyed, and leaves him at Morrison's in the morning. When he left Morrison's he made towards the Falls. A little way from the Pavilion, he fell in company with a Mr. Gilkerson, who was in the army of the government. He and McLeod rode from the Pavilion to Chippewa, and the destruction of the *Caroline* was a subject of conversation between them; for it had been agreed between them that if anything was to be done in relation to her they would participate in it. And now it had been done, and they had nothing to do with it. They rode then up the Niagara river to where Captain Usher lived, and while they were going along the shore of the Niagara river, they were fired at repeatedly; ten or a dozen shots being fired at them, and one of them was picked up and given to McLeod when passing back. While going from the pavilion, they met another person, John McLean, now of New York. He was riding towards Niagara Falls and met McLeod, whom he knew well. Mr. McLean had not gone to rest when he heard the cry of fire, and looked out and saw the flames.

If this testimony is sufficient, we will be relieved from embarrassment as to the question, whether there was any murder

committed at all. And you, as American citizens, will rejoice that you can acquit Alexander McLeod as an innocent man; and I know it will rejoice you, as honest men, to be able to say, Alexander McLeod is as innocent of that imputed murder as any man among you.

If this evidence is sufficient, what becomes of the evidence on which the prosecution rests. You must either say that those witnesses fabricated their stories, or their heated imaginations led them into error—while on our side the witnesses saw McLeod, not at the break of day nor in the darkness of midnight, but were with him from the time he left Chippewa. With them it is either perjury or all truth, and if it is all truth you can have no difficulty in pronouncing that verdict due to the nation of which he is a subject, and due to the American people. And with that verdict, we will say we are satisfied.

THE WITNESSES FOR THE DEFENSE.

October 7.

Alexander C. Hamilton. Reside at Niagara, U. C., since 1835; know William W. Raincock, spoken of by witness, Wilson. He was deputy collector of the customs at the Port of Niagara; cannot say what was the precise time Raincock left Canada; know he was not in Canada in the forepart of November, 1837; went to England in January, 1836, and when I returned in November, Raincock was gone; had been on habits of particular intimacy with him. He has not been in Canada since, to my knowledge; don't think he could have been there without my knowing it.

Hulett Lott. Am a farmer and reside in Lottsville, Pa.; know the witness, Aaron D. Quinby; have known him four years; I know his reputation—

it is bad; would not believe him under oath.

Lansing W. Wetmore. Live in Warren County, Pa.; know witness Quinby; have known him three years; have heard his reputation spoken much of for the last six months; the reports against him for truth and veracity is uniformly bad; I would not believe a word he said under oath, unless corroborated.

Samuel Drown (recalled) by Mr. Spencer. *Mr. Spencer.* Did you have a conversation in February last, with David C. Bates, in which you said you knew nothing about the burning of the Caroline that would do McLeod good or ill? Do not know whether Mr. Bates was present, but when I was subpoenaed to go to Lockport to testify, I said to my brother-in-law, Mr. Hayward, that if they could not find a bill

against McLeod without my testimony they could not convict him with it; recollect no conversation with Mr. Bates.

David C. Bates. Live in Canandaigua and know the witness Drown. Some time last winter, Drown told me he was subpoenaed to go to Lockport in the McLeod case; asked him what he knew about it? He replied that he did not know that he knew enough about it to do McLeod either good or harm.

Cross-examined. Have known Drown since a boy. Formerly he was reputed intemperate and dishonest. But he has reformed and for some time his reputation for truth and honesty has been good.

David H. Sears. Reside in Canada; now in the British service as captain; was the commander of the guard at Chipewa on 29th of December between Davis' tavern and the place of embarkation; from that point sentinels were stationed; was up all that night; was present when the party embarked; Col. McNab was not there that I knew of, as it was dark, and I couldn't distinguish any one I didn't well know or see nearly; there were seven boats, was near by them; was mixed up with the

party; knew McLeod then; had known him since '34 or '35; saw nothing of him in the party; was directed to tell the sentinels not to challenge boats coming upon the expedition, was wished to be kept secret, and the challenge might have been heard on Navy Island; came back to the guard-house and remained there till I saw a light at Schlosser—now know that was the Caroline on fire; observed the Caroline floating down—the fire had raised the steam so that it was easy to see that it was her—remained at the beacon light till the boats returned, about 2 o'clock in the morning. Did not see McLeod among the party. Was at Davis' tavern during that night; did not see McLeod there; remember seeing him the day before about noon; saw him next day about 11 o'clock. I and another officer had gone up the river opposite Navy Island near the residence of Captain Usher. Whilst standing there we saw them bring up a cannon. The people on Navy Island, and they charged the cannon, and looking down the shore we saw two or three gentlemen on horseback; some one said, that's Col. McNab, but I said, No, it's Mr. McLeod.

Mr. Spencer said that he now proposed to bring forward the documentary evidence. He would first introduce the various official documents on the negotiations at present pending between the governments of the United States and Great Britain. First. Communication to our Minister in England. Second. A communication from the British Government to Mr. Fox. Third. Instructions from Mr. Forsyth to Mr. Stevenson, given shortly after the affair of the Caroline. Fourth. Letter of Mr. Stevenson to the British Government, demanding satisfaction in this matter. Fifth. Answer of Lord Palmerston, who was Secretary of State for Foreign Affairs, to Mr. Stevenson. Sixth. A letter of Mr. Forsyth to Mr. Fox. Seventh. Letter from Mr. Fox to Mr. Forsyth, with accompanying documents. Eighth. Letter from Mr. Fox, 12th March, to Mr. Webster, Secre-

tary of State. Ninth. Letter of Mr. Webster to Mr. Fox, dated April 24, 1841.^a

Mr. Spencer did not know but these would be all that might be necessary. There were others which he desired to introduce. These had all now been published, and were public property, which was not the case when the argument was had before the Supreme Court.

Mr. Hall. For what purpose?

Mr. Spencer. With a view to establish the fact that the destruction of the *Caroline* and the killing of *Durfee* were the acts of the public force of Great Britain—which acts were subsequently acknowledged by that government.

Mr. Hall. You wish then to establish that there was a war?

Mr. Spencer. Yes. Or such a state of matters as released the individuals acting under the orders of the government of Great Britain from all responsibility in regard to the consequences of their acts in that capacity. *Mr. Spencer* then proceeded at very considerable length to show that though there had been no formal declaration of war, yet the provincial government of Great Britain had a right to destroy the *Caroline* in self-defense.

The COURT. The present indictment has been sent down to us by the Supreme Court, to be tried like any other issue in the Circuit Court. A motion was made for the prisoner's discharge on the ground that that Court could look behind the indictment, and doing so would be justified in discharging the prisoner. The Supreme Court came to the conclusion that they had no right to look behind the indictment; and second, if they had, that the motion should be denied for the want of merit or of soundness of the ground on which it was urged—on account namely of the absence of anything like war, in such a sense which makes the killing of individuals excusable or justifiable; and for the reason that there was nothing in the pending negotiations which took away the right of New York to punish offenders against her laws. This opinion the Supreme Court after the case had been ably and deliberately argued before them, and which opinion though for the most part written by one was the expression of the united judgment of all the members of the Court. From that opinion, even if I did not agree with it, I cannot dissent. That decision is law with me and may be briefly stated thus: A band of men was composed of Canadian rebels and American citizens who voluntarily joined them. These took possession of Navy Island, and were therefore a hostile force invading Canada. They were directly hostile to the Canadian Government, and I have no doubt that the Canadian authorities had a right to repel that invasion—to suppress that insurrection, and to use all the means which nations, when engaged in war, may use, against rebel subjects or foreign enemies. But while that is true, it is proper also to look at the rights of neutrals. Every citizen of the United States who chose had a right, so far as respected his obligations to his own government, to expatriate himself and join the insurgents,

^a See *post*, p. 311

but when he done so he was subject to all the consequences that the rebel subjects of Great Britain incurred. Any of our citizens who chose had a right to carry provisions and munitions of war to those insurgents at the risk of their forfeiture if captured, and in that view the *Caroline* was liable to seizure as a portion of the armament of the Navy Islanders, when there, or if possible on the high seas. But every member of that hostile band when on our shores was secure from injury by the adverse power; and the British government had no more right to send armed men from Canada to make an attack on that steamboat *Caroline*, than they would have had to send armed men to Buffalo to seize on the arsenal, from which they feared the rebels might take arms, or to assassinate the Mayor of that city, lest he might give up these arms.

Then in my view the decisions of the Supreme Court are not only opinions put forth in their decision, but clothed with authority, binding upon me, and which I have no discretionary power to set aside, even if I had examined the question fully and come to an opposite conclusion from that of the higher Court. I am administering law here subject to the review of that very tribunal, and I therefore feel bound to reject the proposition to offer these matters in evidence.

Mr. Spencer. We now, as rapidly as may be, shall proceed to lay before the Court the evidence taken under commission.

Mr. Hall said these depositions were taken under somewhat peculiar circumstances. It was under a law which was perhaps peculiar to our own State; there was no such power in England or in Canada, and he doubted whether there was such a law in any other of the United States—certainly there was not under the United States government—to take depositions in criminal cases in foreign countries to be used on the trial of a case in this country. They have been taken in great haste, and I have many objections to them, in various parts. I think the manner in which they have been executed is such as to show that we have not the fair responses of the witnesses. Under these circumstances I shall ask the indulgence of the Court for making my objections to them, more fully than under any other circumstances whatever.

The COURT overruled the objections to the depositions.

Sir Alan McNab.^b Know a body of militia was assembled at Chippewa in the month of December, 1837, and January, 1838, to the number of between 2000 and 3000 to repel an expected invasion from rebels and American brigands assembled on Navy Island and on the American shore near Schlosser. They were ordered out by Lieut. Governor Sir Francis B. Head. I assumed

^b McNAB, ALAN NAPIER. (1798-1862.) Born Newark, Ontario. Participated as a youth in the War of 1812. Studied law and practiced in Hamilton, Ont. Member of Canadian Assembly, 1830-1845, and Speaker. Was in the Canadian Rebellion as a Colonel and was knighted for his services. Member of Parliament, 1859. Died in Toronto.

command of the forces assembled there by his directions. I remember the last time when the *Caroline* came down previous to her destruction. From information I had received, I had every reason to believe she came for the express purpose of assisting the rebels and brigands on Navy Island with men, arms, ammunition, provisions, stores, etc. To ascertain that fact, I sent officers with instructions to watch the movements of the boat, and to report the same to me. These gentlemen told me they saw her land a cannon, several men, armed and equipped as soldiers, and that she had dropped her anchor under the east side of Navy Island. Upon the information I had previously received from highly respectable sources in Buffalo, together with the report of these gentlemen, I determined to destroy her that night. I entrusted the command of the expedition to Captain A. Drew, Royal Navy. Seven boats were equipped and left the Canadian shore, but I don't know the number of men in each boat. I ordered the expedition, and first communicated it to Capt. Drew, on the beach where the men embarked. A short time previous to their embarkation Capt. Drew was ordered to take and destroy the *Caroline* wherever he could find her; was on the beach when the boats embarked; had been there about a quarter of an hour; noticed most of the persons going into the boats; stood within two or three rods of most of the boats as the men went, and while they were preparing; have known Alex McLeod five or six years; think I saw him on the day previous to the destruction of the *Caroline*, but in what place and

on what business I do not recollect; did not see him when the boats shoved off to destroy the *Caroline*. He was not in my presence that evening; was on the shore when they returned, and was near the boats when the men landed; saw the faces of perhaps one half of those who landed, but I did not see Alexander McLeod, nor do I know where he was; saw the *Caroline* on fire going down the river after the boats had left her; made a return to the Lieut. Governor of the officers and men who destroyed the *Caroline*, and I am sure the name of Alex McLeod was not among them; was not in command when the force took possession of Navy Island.

John Harris. Reside in London, Upper Canada; have no personal acquaintance with Alexander McLeod, and am not certain that I ever spoke to him in my life; knew him by sight, and not for a longer period than a week; recollect the destruction of the *Caroline*; was in Chippewa a week or ten days before that occurrence; was engaged under Captain Drew in manning the boats; and had every opportunity that an officer has of seeing and noticing those engaged. Alexander McLeod was not in any of the boats, nor was there any in the boats of that name; was in the boat with Captain Drew, and saw all the persons in the boat. McLeod was not in, nor did I see him at any time; was one of the boarding party and was in her cabin. I was the last person who left her. Alexander McLeod was not with the assailants, nor did he have anything to do with the destruction of the *Caroline*.

Did not see that any person was killed, nor did I see any person placed on the wharf; saw one man severely wounded. I saw the men on their return to the Canada shore. Alexander McLeod was not among them. Their names were particularly taken down on their return to Chippewa, as they left the boats. The name of McLeod was not on the list. I saw the list then, and have seen it since. Seven boats left Chippewa, five only reached the Caroline, and five returned in company. I know Sir Allan McNab. He was on the beach when we started. It was by his command that the expedition was undertaken as commander of the forces on that station. The directions I heard him give were to destroy her wherever we could find her. Captain Andrew Drew was in command of the expedition by order of Sir Allan. Am positive Alexander McLeod was not in the boats, as I was employed as an aid-de-camp to Captain Drew in superintending the manning of the boats.

Edward Zealand. Live in Upper Canada, the town of Hamilton; am 45 years of age; know Alexander McLeod, and have known him since January or February, 1838, but was not acquainted with him prior to that; recollect the destruction of the Caroline. The expedition embarked from Chippewa Creek. The persons engaged were an hour or two making preparation for it; was assisting but had no opportunity of observing the persons engaged, except those in the boat I was in; do not know where McLeod was at that time. He was not in the boat with me,

nor was he in my immediate neighborhood; went in the boat commanded by Capt. Drew; was on board the Caroline the night of her destruction; was nearly the last to leave her; did not see McLeod among the assailants, and I do not believe he was among them. There was a dead man lying on the dock at Schlosser, but he was not conveyed there. He met his death during the attack on the Caroline, but I do not know whether he was shot on board the Caroline or on the dock; think the shot that struck him was from the direction of the tavern or store. He could not have been conveyed on shore without my knowledge; saw the men engaged in the expedition on their return to Chippewa; did not see McLeod among them, and believe he was not there.

October 8.

William S. Light. Live in North Oxford, Canada. I have no personal acquaintance with Alexander McLeod; he was once pointed out to me in the streets of Chippewa; believe him to be a British subject. I recollect the destruction of the Caroline; was at Chippewa at the time; cannot speak positively as to the persons who went on that expedition, except such as went in the same boat with myself; do not know where A. McLeod was when the boats first put off. He was not in my boat; did not know all the men in my boat, there were two strangers; saw the Caroline on the night of her destruction. I boarded her, the first from my boat.

Alexander McLeod was not among the first assailants from the first attack upon her till her

final destruction, to my knowledge; saw no one killed on board the *Caroline*. I saw a man in the after cabin desperately wounded, and was ordered by Captain Drew to carry him on shore; took him to the gangway, and believe that he either walked or was carried on shore, but cannot say positively.

John Gordon. Live in the town of Hamilton, Canada; know Alexander McLeod, late Deputy Sheriff of the District of Niagara, by sight, but have no personal acquaintance with him. I think the first time I saw him was when he was a passenger on board the steamboat I commanded; cannot state precisely that I saw him more than once; recollect the destruction of the *Caroline*. The persons who went in the expedition embarked at the mouth of the Chippewa river; was there about half an hour before their embarkation. I do not know how long the others were there before I came. I remained on the beach during that time; had no opportunity of knowing any of the persons except those in the boat which I commanded. I do not know where A. McLeod was; he was not in my boat. I saw all the persons in the boat; went in before landing at Schlosser. I am satisfied A. McLeod was not one of them. I did not see him in my way from Canada to Schlosser; did not see A. McLeod on board the *Caroline*; to the best of my knowledge he was not there; did not see, nor do I know anything of any person having been killed during the attack on the *Caroline*, or conveyed on the Canada side at Schlosser, and remaining there. I did not see A. McLeod that night or since.

Christopher Beer. Was a naval officer attached to the war steamer *Minos*. Prior to the destruction of the *Caroline* knew Alexander McLeod by sight, but had no acquaintance with him; was at Chippewa at the time of the destruction of the *Caroline*, and was in that enterprise; knew all in the boat with me; McLeod was not among them; did not see him at all that evening; I was in every part of the *Caroline*; went on board with the rest, and we all left about the same time; did not see McLeod among them, either on the expedition, or among our number when we returned. Did not know all the men on the expedition. Capt. Drew commanded; his orders were, The steamboat is our object—follow me.

Stephen McCormack. Am a Lieutenant in the Royal Navy. The first time I saw Alex. McLeod was on the night of the 28th December, 1837; perfectly recollect the destruction of the *Caroline*. The persons who embarked in the expedition were for about half an hour standing on the beach; was getting the boats ready; took a list of the names and went round to get volunteers by direction of Capt. Drew, as I was second in command. When the boats went to destroy the *Caroline*, do not know where McLeod was; he was not in my boat; did not take down his name, and am positive he was not of the party; did not know all the men in the boat; went with the party on the expedition, and did not see McLeod among us at any time; did not see him at all that night; was the second of our party who landed on the *Caroline*, and was in most parts of her; was put into one

of the boats after I was wounded, before the other assailants left the Caroline. I was so disabled that I cannot recollect who I saw on my return. I saw McLeod shortly after the destruction of the Caroline, and he expressed his regret that he had not heard of it, as he would have accompanied us.

Robert Armour. Live in Coburg, U. C.; knew the persons in the boats that went to the Caroline; do not know where McLeod was then; he was not in the boat I was in. Saw most of the assailants; did not know all of them; saw most of their faces. Did not see McLeod that night.

John Archibald. Was a servant of Col Morrison. McLeod came to the house; so did Mr. Cameron; don't remember just when; knew McLeod came on horseback, for I put off the saddle and the horse in the stable.

J. P. Battersby. Live in Lancaster in Canada; was one of the expedition to the Caroline; our boat did not reach it as we had bad rowers; did not know McLeod; he was not in my boat to my knowledge; did not see all the men in the expedition, nor know them all.

Thomas Hector. Know McLeod; had seen him often; was in the crowd which watched the expedition embarking; did not see him in any of the boats; afterwards got into a boat and rowed out to the burning Caroline; McLeod was not in my boat; did not know all the men in the boats, or see all their faces.

Neil McGregor. I was with the expedition in Battersby's boat; know prisoner; did not see him in the boat; I was not in

any other boat; reside in Chippewa.

H. R. O'Reilly. Live in Hamilton, Canada; have known prisoner for nine years as Deputy Sheriff; met him on circuit often at the assizes; was in the expedition against the Caroline; was in Beer's boat; saw all the men in it; am positive McLeod was not in it; did not see him among the assailants that night; have no recollection of seeing him anywhere that night.

Frederick Cleverly. Was in the same boat with Beer and O'Reilly; first time I saw McLeod was evening of the 28th December, 1837, when he was preparing to accompany Capt. Graham round Navy Island; was present at the embarkation of the expedition against the Caroline; saw most of them embark; McLeod was not in the boat with me; have never seen him since the 29th December, 1837, when he returned from going round Navy Island with Capt. Graham; went on board of her, and to most parts of her; boarded her with the rest, and left her about the same time; did not see McLeod among them, nor do I believe he was among them when they returned to the Canada shore—nor have I seen him since; did not know all, but did most of the men in the expedition; did not recognize the features of all of them.

October 9.

William Press. Live in Hamilton and keep the Promenade House; kept a public house at Niagara; knew McLeod well; had known him a year before the 27th of December, '37; remember the trouble in Canada about that period; was at Chippewa

only once; that was on the 27th of December; returned to Niagara the same evening; took McLeod and O'Keefe in a wagon from Niagara to Chippewa; entered in a cash book the money received for carrying these persons; the date was 29th December, 1837; the Caroline was destroyed that night; heard of that event the next morning; put my horses in a yard opposite Davis' Tavern; started from Davis' immediately after dark; O'Keefe rode with me to Niagara, and McLeod to Stamford; the latter place about six miles from Chippewa; the roads were very bad; were at least an hour and a half going to Stamford; McLeod left me at the gate of Capt. Morrison.

John Morrison. Reside at Stamford, U. C., moved there from Toronto in June, 1835; know Alexander McLeod perfectly; made his acquaintance in '36; heard of the destruction of the Caroline on the morning the 30th December, 1836, from Col. Cameron, formerly of the regiment I belonged to; was told by one of my sons that the Colonel wanted me at the gate; went down and saw him there; was asked if I had heard the news, and said, no; Col. C. then told me that a party had gone to Schlosser the night before and cut out the Caroline and destroyed her; I said then, Your friend McLeod is in our house, won't you come up and see him? he begged to be excused, as he was in a great hurry; Col. C. was in a wagon; he handed me a piece of wood, saying it was a piece of the Caroline, which I took to the house and cut from it a piece; kept the piece and returned the larger

fragment; was told it was got under the Falls; bade the Colonel good by; from other sources learned during the day of the destruction of the Caroline; Colonel Cameron served with me in France, Spain and Portugal under the great Duke of Wellington for 14 years; McLeod was in my cottage at the time conversation took place; he came there a short time after 7 o'clock on the night before that morning; he slept in the parlor; he drank tea that evening with my family; took breakfast in the parlor next morning; McLeod and I retired to bed nearly at half-past 12 o'clock; spent the evening after tea in familiar conversation after taking a tumbler of toddy; McLeod had not left his room before I saw Col. Cameron on next morning; after returning the piece of wood to Cameron, I went to the cottage; at the threshold of the door saw McLeod half-dressed in the room; repeated to him the intelligence received from Cameron; McLeod said, You don't say so? I replied Col. Cameron told me so.

McLeod then said, I wish to G—d I had been there! and McLeod continued, Where is Archie? I want my horse! Archie went off to get the horse—that was a little past eight—he was pressed not to think of going till he got breakfast, and agreed to remain; after being dressed and having breakfast, I went down with him and saw him get his horse and ride towards Chippewa—next saw McLeod the afternoon of the 2nd of January following.

Archibald Morrison. Am son of last witness; know McLeod; was at father's gate when Col-

Colonel Cameron came up, about 8 o'clock in the morning; Col. C. told me to tell father to come to him; went up to the house; a gentleman was with Col. C.; they were in a two-horse wagon; my father went down; went down with him; heard them say that the Caroline was burnt; heard Col. C. say that; McLeod was then in the parlor of my father's house; he came there the night before, before tea I think—he went away next morning after breakfast, about 8 o'clock; he went away on horseback.

Mrs. Margaret Morrison. Have known McLeod for six years—remember hearing of the burning of the Caroline—it was in the morning when I heard it—then understood that the boat was burnt the night before—the intelligence was brought by Colonel Cameron—understood that he brought a part of the boat—saw the piece that Mr. Morrison cut off at the time McLeod was in the parlor; he came there the night before about 7 o'clock; took tea there that night; he stayed all night because Morrison wouldn't allow him to go away that night; Mr. Morrison and McLeod sat up till past 12 o'clock; McLeod and Mr. Morrison took a glass of toddy together; McLeod slept in the parlor; he slept on a stretcher; the parlor was not commonly used as a bed room; Mr. McLeod's boots were taken from the parlor before bed time to be dried at the kitchen fire; they were at the same place in the morning; they were then dry; but were wet the night before; Mr. McLeod did not leave the place that night; could not have done so without my knowledge; saw McLeod

again in the afternoon of the same day, when he returned from Chippewa, on his way to Niagara; he had a cannon ball in his hand, which was said to have been fired from Navy Island.

Harriet Morrison. Am daughter of Capt. Morrison; was at home in 1839; had known McLeod since a year after my father and family came to this country; heard of the affair of the burning of the Caroline on the morning that McLeod was there, 29th of December; father heard of it from Col. Cameron; saw McLeod the night before at tea about 7 o'clock; retired between 9 and 10; McLeod had not then retired; saw him the next morning at breakfast; he then left the house to go to Chippewa between 9 and 10.

Cross-examined. The family usually retired about 10 o'clock; McLeod being there was the cause of part of the family sitting up later than usual; had heard some days before of the Caroline and about her carrying ammunition; am sure heard this before McLeod was there that night; saw Col. Cameron from my bed room; knew Col. Cameron; had been introduced to him in Niagara by Angus McLeod; previous to this time; breakfasted about 8 o'clock that morning; saw McLeod the same day in the afternoon at the gate; he then had a cannon ball in his hand; he was going to Niagara; he was at the house of my father the day after New Year's; brother came home on the forenoon of New Year's day.

To *Mr. Spencer.* Mr. McLeod was at our house on Christmas Eve, and remained during the night; heard that the Caroline

was employed in conveying ammunition to Navy Island, before I heard of her destruction; heard of that two or three days before; can't say from whom.

Duncan Cameron. Live in York, Canada. The morning after the destruction of the Caroline about 9, in company with Mr. M. C. Migan, the Presbyterian minister of St. Thomas, I stopped at Lieutenant Morrison's gate in front of his house, near Stamford, about three or four miles from Chippewa. Mr. Morrison came down to his gate; had a conversation with him for about four minutes; do not remember every particular subject of conversation; may have mentioned to him the destruction of the Caroline, but I could not swear that.

Judge John McLean. Reside in New York City; am in the City of Washington more than half the year; a few days previous to the burning of the Caroline, was at the American Hotel in Buffalo, there saw McLeod in the bar room; there were a number of persons present; and a conversation ensued in relation to the Canada troubles; McLeod became desirous of retreating from the room for safety; I and another assisted him to do so; the night of the burning of the Caroline I spent in the quarters of Col. McNab, at Chippewa; got there at about 7 o'clock in the evening; did not see Mr. McLeod there. I saw him next morning after leaving McNab's quarters; he left there about 10 o'clock in company with Mr. Foote in a wagon, and near the Pavilion Hotel Mr. McLeod passed me on horseback going toward the camp.

Jasper P. Gilkinson. Lived at Niagara since March, 1836; knew Raincock; he left before the troubles; he did not go away in any very meritorious way; he went in September or October; I was of the force at Chippewa; was in Chippewa on the 29th; lodged about half a mile below Stamford, at a tavern, towards Niagara; returned to Chippewa next morning about 10 o'clock; saw McLeod; he overtook me and a person who accompanied him; McLeod was on a bay horse; it was between Stamford and the Pavilion; when we got to Chippewa rode along to near Captain Uster's house; two guns were fired from Navy Island at the party; suggested the propriety of returning; in returning the lower battery was discharged at us; one shot entered the bank of the river; a soldier of the 24th picked up the ball and gave it to McLeod; he took it home.

. October 9.

Jared Stocking. Am brother to Samuel Stocking, of this city. I reside at Niagara, U. C. In December, 1837, was stationed at Chippewa, and commanded a regiment of dragoons; was there on the 29th of that month. I know the witness Press. He resided opposite to me; saw him at Chippewa the 29th December, 1837. He dined with me that day, and I spent the afternoon with him. It was his first appearance at Chippewa; knew Mr. Raincock. He was my neighbor. He was a custom house officer, and I often entered goods at his office; am a creditor of his, and know that he left Canada before the breaking out of the troubles; think it was in the summer.

Cross-examined. Saw the the 29th. That was the only Caroline go back and forward on time I saw her cross.

Mr. Spencer said that the Court having excluded the testimony first proposed on the opening of the defense—that of a national character—and thereby confined the defense to testimony bearing upon the other branch of the defense—to-wit, the absence of McLeod from participation in the destruction of the Caroline, the counsel for the defense had now brought before the Court and jury all the evidence they had to offer in that behalf, and now closed their testimony and rested.

THE PEOPLE'S CASE RESUMED.

Mr. Hall offered the enrollment and license under which the Caroline ran, both dated 1st December, 1837, and to read the statement made by the prisoner at Lewiston, N. Y., 14th of November, 1840, formally, before JUSTICE BELL, signed by him in the presence of his counsel, Mr. Bradley, duly authenticated by the Justice. No objection being made, the statement was read.

Alexander McLeod states that the evening of the night previous to the attack on the Caroline he was informed she had left Buffalo for the service of the Navy Island people. Was one of ten persons who went in a boat with Captain Graham on the morning of the 28th December. Went round Navy Island to look out for the Caroline. Did not see her and returned about 8 o'clock to Chippewa. About 3 o'clock that afternoon went to bed at Mr. Davis'. Got up about 7 o'clock or half-past. Came to Mr. Davis and told him to tell the hostler to get his horse. The stable keeper brought the horse to the door. I mounted him and went to Stamford, five or six miles from Chippewa, in company with Mr. Press, a tavern keeper of Niagara. Went to Captain Morrison's. Gave the horse to his son, ate supper and went to bed about 11 o'clock. Next morning was dressing, when Capt. Morrison came in and told me that Col. Cameron had just come from Chippewa and told him that they had burned a steamboat that morning or the evening before. Remarked to Capt. Morrison that it must be the Caroline, as she was expected down. Ate breakfast between 8 and 9 o'clock, and immediately after got upon horseback and went to Chippewa. I met with James M. Dyke between Stamford and the falls, who informed me of the particulars. Was in the Pavilion a few minutes and arrived at Chippewa between 9 and 10 o'clock a. m.

Mr. Hall then read the examination of the *Prisoner* taken before JUSTICE BOWEN of Niagara County on December 17, 1840.

Alexander McLeod on being examined by the District Attorney, not on oath, says that on the Christmas eve before the Caroline was burned he was at Buffalo, and there learned that the steamboat Caroline was then preparing to enter into the Navy Island service, and that she was then lying at or near the mouth of Buffalo creek; that he (defendant) the next day went from Buffalo to Chippewa, Upper Canada, and there gave information that the

Caroline was fitting out for the Navy Island service, and on the next day, which was Tuesday, made affidavit to it; and on the night previous to the burning of the Caroline, defendant, on his way to Niagara, stopped at the Pavilion, Niagara Falls, and there learned that the Caroline either had left, or was about to leave Buffalo, to come down to Navy Island; and then defendant returned to Chippewa and called on Col. McNab and informed him of the fact, and McNab said he could not act upon the fact that the Caroline had merely come down, and could do nothing. Defendant and Captain Philip Graham then got a boat between 5 and 6 o'clock, either on Thursday or Friday morning, and got eight sailors and went round the Island. They passed between Grand and Navy Islands about daylight, when they commenced firing upon them from Navy Island, and two musket shots were fired upon them from Grand Island. They got back to Chippewa about 8 o'clock, and defendant remained at Chippewa all that day. Defendant went round the Island to see if the Caroline had come down, but did not discover her; but about 2 o'clock in the afternoon defendant saw her passing from Schlosser to the Island. Defendant then returned to John C. Davis' tavern, at Chippewa, and being rather unwell, went to bed about 3 o'clock in the afternoon, and got up again about 7 o'clock, or a little before, intending to go to Niagara, and directed Davis to get his (defendant's) horse. Defendant got his horse and started away with a Mr. Press, in his (Press') wagon, defendant leading his horse; and when they arrived at Stamford, about five miles from Chippewa, defendant called in at Captain Morrison's, an acquaintance of defendant, and Morrison asked him (defendant) to have his horse put up and stay all night, and he accordingly did so. He arrived at Captain Morrison's house about 8 o'clock p. m., or a little after. Defendant went to bed about 11 o'clock and arose about half-past 7 o'clock next morning; and at between 8 and 9 Captain Morrison came to defendant in the parlor where he (defendant) had slept. Defendant then standing in the door of the room, and Morrison said: "They have burned an American steamboat last night." That defendant said: "It must be the Caroline," and Morrison said, "Here is a piece of her that went over the Falls." After that, defendant got his breakfast, then got his horse and went down to Chippewa, and got to Chippewa a little after 10 o'clock in the morning; that he did not go into Davis' tavern at all that day; that he went into Chippewa with Jasper Gilkinson and Captain Sparke; that about 11 o'clock he went to McNab's quarters, and found the officers at lunch, and there saw the boy, Luke Walker, who has been examined; that on the Monday after the burning of the Caroline he went to Toronto, and on the next day he (defendant) went to Thorn Hill, about 14 miles from Toronto, and returned to Toronto between 4 and 5 o'clock that evening. The morning after the burning of the Caroline he was not at Chippewa before some time after 10 o'clock in the morning. No person slept in the room with him at Morrison's on the night that the Caroline was burned. There are eight or nine, and probably more individ-

nals in Morrison's family. He does not know who were engaged in the burning of the Caroline, except by report. Knows James McLem, a merchant at Chippewa, and Oliver McLem, also a merchant. Has been in James McLem's store frequently, but can't say whether he was there the day before the Caroline was burned, but thinks not. He never was in Oliver McLem's store. Was not in McLem's store the day before the Caroline was burned, when some one was ordered out of the store, and the doors were locked, If he was there that day the doors were not locked; if they had been locked he should have remembered it. He don't think that any of the persons who were actually engaged in the burning of the Caroline now reside in Chippewa. Captain Drew now resides in England. He believes that a number of the men who started in boats to go and burn the Caroline reside within forty miles of Lockport, but he has no knowledge of the fact except from information.

That he never told any person that he was engaged in the burning of the Caroline, nor did he ever present a pistol to any one with blood on it, saying that the blood was that of a Yankee, or anything to that effect. Shortly after the burning of the Caroline there was an article published in a newspaper, stating that the defendant was engaged in the transaction, and defendant at once denied it orally, and published an article in a public paper, in which he specifically denied it. Before defendant went to Buffalo at the time above spoken of, the Governor of Upper Canada expressed a wish that some one should go to Buffalo, and defendant, in compliance with the wish and request of the Governor, went. He has never, at any time, stated that he was at Niagara the night the Caroline was burned. That he (defendant) was in Buffalo about the 12th of December, 1837; that since the burning of the Caroline he has had his thigh broken. This happened the 22nd of April, 1838, and he has hardly been well since. He has had the ague, and recovered from that only a few months since.

Mr. Hall read the deposition of *Mrs. Morrison*, similar, in substance, to the evidence she gave yesterday; and in addition, that her daughter Helen had lived with McLeod, but was never married to him. She was, however, married afterwards to another man.

Helen Morrison also deposed that McLeod was at her father's house on the night the Caroline was burned, and she heard her father tell him next morning of the burning of the Caroline. He was told of it in the parlor before he was wholly dressed. He left the house about 10 a. m. Mc-

Leod slept there on Christmas night, and had frequently slept there.

Mr. Hall proposed to put in evidence indictments against several of the witnesses for the defense, as participants in the burning of the Caroline; the COURT deemed such evidence inadmissible.

Mr. Hall then read the deposition of *Russel Inglis*, taken under commission. He stated he was barkeeper of the North American Hotel at Toronto; that he knows Alexander McLeod, and he was at that hotel on the 31st December, 1837, in company

with several gentlemen and officers.

Rev. John Marsh. Am a minister of the gospel of the Methodist persuasion; was acquainted with witness Samuel Drown for four years in Canada, and never heard aught against his character, nor anything to discredit his veracity.

Cross-examined. Was intimately acquainted with Drown, and for a year, while Drown lived at St. Catharine's, I was in the habit of daily intercourse with him. He was in the employ of my brother and myself part of the time; never heard his character questioned.

Platt Smith. Reside in Lockport; in December, 1837, was in Canada, at Chippewa the most of the time; I recollect the occurrence of the burning of the Caroline.

Mr. Spencer inquired of counsel what they intended to prove by this witness.

Mr. Hawley replied that he intended by this witness to rebut the evidence given on the part of the defense as to the alibi, and to prove that on the night of the burning of the Caroline McLeod was at Chippewa, and not at Morrison's. Also to sustain the witness named Drown, whose testimony it had been attempted to impeach.

Mr. Spencer denied the right of the prosecution, after resting its testimony, to offer accumulative evidence.

The COURT ruled against admitting the testimony proposed.

Platt Smith. Knew Drown; was assisting brother when Drown was with him; was called up by Drown in the midnight of the burning of the Caroline.

The *Attorney General* proposed to prove by this witness that he went with Drown, etc., so as to establish the truth of Drown's testimony. *Mr. Spencer* objected. *Mr. Hall* held that whatever threw light on the truth and veracity of the witness Drown was evidence.

The COURT. Then you abandon the point as to Drown's declaration?

Mr. Hall. Yes, at present, but not hereafter.

The COURT excluded the evidence.

Cross-examined. Never heard anything against Drown's veracity; heard the testimony of Capt. Sears; was at the beacon light between 12 and 1 o'clock; there might have been four boats that came up together, but think there were only three; one fell below the cut, and might have went into the mouth of the Chippewa creek; did not see it come in; persons were continually passing and repassing along the shore; some gave the countersign and a good many did not; found no difficulty in going to the beacon light; had the countersign, but forgot it before I got to the sentinels; this occurred about 1 o'clock.

Mr. Hall. Can you say whether, from anything you know, that Alexander McLeod could not have been at Mr. Morrison's at Stamford that night, between 1 and 2 o'clock that morning?

Mr. Spencer objected.

Mr. Hall was astonished that at that stage of the trial a rigorous rule had been insisted on after such a liberality had been manifested all along in favor of the prisoner. He trusted the

court would at once decide that the question was proper.

The COURT had already excluded on sufficient grounds questions going to elicit the answer now sought; this evidence was in chief and not in reply, and of course was inadmissible. The COURT then put the question thus: If you can state that McLeod was not there for any other reason than that he was at Chippewa, you may answer; if not, you cannot answer.

Mr. Hall. Platt Smith, did any delay occur at the disembarkation?

Mr. Smith. There was a delay only of a very few minutes, afterwards fell in with this party; they stopped at Davis' house, and some one asked if they should wait for the others; they did not wait; I was there as long as they stood there; whilst I was there the party from the other boats did not come up.

Mr. Hall desired to ascertain from the witness where the prisoner was in the morning.

Mr. Spencer. Where do you propose to show he was?

Mr. Hall. At Chippewa.

The COURT. When?

Mr. Hall. At sunrise; it is not at all cumulative evidence.

The COURT. It is still evidence of the same description, connecting the prisoner with the transaction.

Mr. Hall. Not independently of the other evidence.

The COURT decided the evidence was inadmissible.

Mr. Hall proposed to ask the witness: Do you know any place where McLeod was met between 1 and 8 o'clock, on the morning of the 30th December, 1827?

The COURT. This is substan-

tially the same question as before, and, therefore, inadmissible.

Mr. Hall. Do you know that McLeod was not at Morrison's at 8 o'clock on the morning after the destruction of the Caroline?

The COURT. The fact elicited came within the rule; it was not to be got in any such ingenious way as that.

Mr. Hall. Did you see the prisoner as late as 10 o'clock at Chippewa, or any other place?

The COURT thought that this question might be put, as none of the evidence fixed the time of McLeod's arrival at Chippewa, nor where he was at 10 o'clock.

Mr. Smith. About 10 o'clock saw McLeod go up from Davis' across the bridge down the Chippewa; there might have been one person with McLeod; he was going from the quarters of Col. McNab; saw him on the Sunday following; then saw him very near the guardhouse, three quarters of a mile above it; it was about 11; I did not know who were with McLeod; cannot say whether it was Mr. Gilkinson; did not recollect seeing McLeod after that; one of the persons was spoken of as being McNab; it was not he; it was a stranger to me. He rode on a white horse.

John C. Davis. Reside at Chippewa; am the proprietor of "Davis' tavern" there. Was there when the Caroline was burnt; recollect that time; was then at home. Recollect distinctly the transaction; know the prisoner at the bar; he usually stopped at my house when in Chippewa.

Mr. Hall then proposed to ask the witness: "Did you on the following morning see the prisoner?"

Mr. Spencer objected, and the COURT excluded the question.

Mr. Davis. I retired to bed after 12 o'clock. Was at the upper end of the cut when the expedition was returning; avoided seeing the party; went home; couldn't say I retired to bed before or after the party returned. Didn't see Mr. Sears at all after he returned; am confident of that. A number of the officers stayed at my house; my room was immediately adjoining the officers' room, and could hear in it the voices of persons in the room; officers were there that night; imagined that I recognized voices there that night; there was a good deal of loud talking there; did not see any of the party that night drinking except one; there was a bed took out of his house that night, and there was some talk about that—waked about sunrise—before I got out of bed saw some person—

Mr. Spencer objected.

The COURT ruled that the witness could not say who that person was, for reasons already stated.

Mr. Davis. Prisoner went to bed in my house that afternoon; he got up in the evening; saw him about 8 or 9 o'clock; he ordered his horse then and said he was going to Niagara. A gentleman came in and asked for him afterwards; it was Mr. Press.

Philo Smith. Resided at Chipewa when the Caroline was burnt; recollect that occurrence; was there part of the next day; was there about 8 o'clock the next day; knew McLeod well.

Mr. Spencer. What do you purpose to do?

Mr. Jenkins. Does that come within the rule?

The COURT. Yes.

Mr. Jenkins. Am acquainted with Samuel Drown. His character for veracity never heard questioned.

James H. Dyke. Reside at Niagara Falls, on the American side, and know the prisoner; did not see him on the 30th of December; saw him the morning after the patriots left the Island; saw him in Stamford; he was hitching a horse before a wagon; didn't know what horse; can't say it was Capt. Morrison's; told McLeod the fun was over—that the patriots had left the island.

Timothy Wheaton. Resided in Canada in '38; recollect being then in the town of Niagara; saw the prisoner there; conversed with him; said that "the poor fellows (meaning the sentinels) had a hard time of it." Conversed about the difficulties in Canada before that, and then asked him how many of the Navy Islanders had been killed on the Canada shore; he replied two; then conversed of the members on the Island; didn't know that he said how many were there, but he said they never would have the Caroline to assist them again if they got onto the Island. I then said I understood she had been destroyed, and the prisoner said she had; he said he was the second or third man that boarded her; he was going on to say that he came near being killed; then some man came up and McLeod said, "Hold on a moment, Heron!" That's all the conversation I had with McLeod, for he started off then; had never seen McLeod before; lived then at

Whitby, about 65 miles from Niagara.

Wm. Defield. Reside in Canada. Knew Capt. Morrison; had been at his house; in September, 1839, heard him say he hoped the American authorities would get McLeod and punish him for participancy in burning the Caroline; that McLeod had seduced his daughter, who was married to a Mr. Taylor. When I saw him a year later he took a different view; he thought that McLeod stopped at his place that night; asked him if he was sure of that; said he was not, but McLeod was one of Her Majesty's subjects, and must be protected at any risk.

Cross-examined. Was on Navy Island when the Patriots were there; was there eight days. McKenzie took me as a prisoner, and kept me till the evacuation. Saw the men on parade, and counted 344 rank and file on the Island besides the guards and officers. Am a school teacher. Did not teach school on Navy Island. They knew rather more than I did. Am a native of Canada, but no great friend to it.

John C. Shubbrick was called for the purpose of proving that there was no firearms on board the Caroline and to impeach the evidence of the prisoner's witnesses, who swore to the contrary.

The COURT. It is already proved that they were unarmed. Mr. Spencer, is it part of your case that the attacking party were fired on?

Mr. Spencer. No, your Honor; I object, however, in addition that this is cumulative evidence. They attempt now to pro-

duce new evidence. The case for the prosecution has been shrouded in gloom contrary to all precedent.

Mr. Jenkins. Did the learned gentleman not give the Editor of the "Observer" a list of the witnesses for the prosecution?

Mr. Spencer. I took the names in pencil as they were called by the clerk on the first day.

Mr. Hall contended that it would not have been prudent at one time to disclose the witnesses. But subsequently, in the spirit of liberality, the names were given in exchange for those of the prisoner's witnesses. And it was extraordinary that a counsel, after entrapping him (Mr. Hall) should discover so little of the generosity and magnanimity constituting a gentleman.

Mr. Spencer said that Mr. Wood gave merely names without residences as subjects of their testimony, and very few of them had been produced on the trial.

The COURT hoped the acerbities exhibited by gentlemen would all be smoothed down before another week, and wished to know Mr. Hall's object in producing this witness.

Mr. Hall. To prove the fact of their being unarmed on board the Caroline.

The COURT excluded the evidence as cumulative.

Mr. Spencer read the deposition of witness *Defield*, taken before the Justice. In this, *Defield* stated that he had never conversed with Capt. Morrison on the subject of the destruction of the Caroline till the evening before the deposition was taken, and that Morrison said he was not certain that McLeod was at his

house the night the Caroline was burnt.

Dr. Joseph Hamilton. Had known Defield since he was a boy; his reputation is not good; am a citizen of the same village with Defield; know Capt. Morrison; his reputation is good. Defield was a sergeant in the militia; he was not appointed as a lieutenant; saw him on duty as sergeant before he deserted to Navy Island. Am a brother of the late Sheriff Hamilton; prisoner was my deputy; do not know that the prisoner is liable to any civil or criminal suits growing out of that connection. Did not know anything of the prisoner's being called on by Sheriff Hamilton to disavow connection with the disaffected party in Canada.

To *Mr. Spencer.* Am president of a bank, and in that way negotiated bills for Capt. Morrison. Capt. Morrison has been perfectly sober since he was at Lewiston as a witness; he was intoxicated then. Has not been so since to my knowledge.

Joseph Center (recalled). Was the agent who attended the execution of the Canadian commissioners; was present at the taking of Harris' evidence; he was

prompted by the commissioners; didn't recollect more than one instance; that was in reference to the number of persons on the bank; and one of the commissioners stated on that point what had been stated by a former witness; no direct reference was made, however; the commissioners refused to take down my answer to the 13th cross interrogatory, as to what part I had taken in the destruction of the Caroline; I said I was the last man left her; that I set her on fire, throwing two "cackuses" into her; refused to have my first answer recorded, and the commissioners refused to put it in their minutes.

Mr. Hall proposed to show by this witness that the conduct of the commissioners had been irregular in some points.

The COURT said if so *Mr. Hall* could take the matter before the Supreme Court by motion to set aside the depositions; and the evidence of this witness on that point was altogether irrelevant.

Andrew Robinson testified as to the character of Defield; knew him for a number of years; never knew anything against his truth or veracity.

The COURT admonished the Jury of their duty during the Sabbath, when, unpleasant as it was, they must remain together.

Mr. Mott, one of the Jurors, was allowed by consent of counsel to visit, under charge of a constable, a brother lying at point of death.

Another Juror asked the privilege of absence in the same way, which was denied, as no such cause for his separation existed as in the other case.

Another Juror asked if they could go to meeting.

The COURT. Yes, certainly; you must go in a body, sit together, and be attended by a constable.

MR. BRADLEY FOR THE PRISONER.

October 12.

Mr. Bradley. Gentlemen of the Jury: This cause, which, more than any other ever brought before a jury, has involved interests higher than those of individuals—disturbed the tranquillity of the country and endangered the peace of nations, now approaches its close. After a year of intense excitement, breaking out in popular tumult, giving origin to high legislative debate, and angry discussion between governments, the trial has come, and the testimony is ended. To the prisoner, whose life and death have been in the issue, it is closed. To this country, too, whose repose this cause has shaken, whose honor it has involved, and whose armies and navies it has threatened to call forth to glory or disgrace, it has likewise closed. To another nation, also, it has closed, whose subject the prisoner is; whose office, his imputed offense is to have obeyed; a nation which avows the act charged upon him as a crime to have been a duty, and stands ready to vindicate the faith plighted by all governments, of protection to be given for obedience rendered, by the resources of an empire on whose dominions the sun never sets.

Knowing the immense interests at stake, interests not local or partial, but national; knowing the mighty preparations made to ensure a successful prosecution, and hearing the anticipated triumph which has been pealed through the land by those in feeling and motive arrayed against us, I now confess to you, that, a week ago, I sat down to the trial with a sinking heart, lest there might come an adverse verdict. But that hour has long since passed, those feelings long since subsided. Notwithstanding the great array of witnesses, notwithstanding the zeal and energy which have marked the case for the People from its commencement to the end, a zeal which nothing has yet occurred to cool, an energy which hardly law itself was of force to baffle, I say to you again, that I feel neither a sinking heart nor the slightest anxiety as to the result. With

the signal failure of the prosecution to establish a case of guilt, all fear, all solicitude has disappeared. The defense still rests on a foundation which no skill can strengthen, no want of it impair—the foundation of unquestionable innocence.

It has been often said in your presence, said by the counsel for the People, said by the Court, and we now say that the simple question for you to try is the fact of the prisoner's presence at Schlosser when the Caroline was burnt, aiding and abetting that enterprise. This is the sole inquiry; this the only issue. All evidence bearing upon this you will regard; all not bearing upon it, or throwing light upon the character, motives, and ability of the witnesses, you will, of course, leave out of view.

Now, it is a principle of law, with which you are doubtless all familiar, that in criminal cases, even the slightest and most unimportant, every doubt goes to the benefit of the accused. Preponderance against him is not enough to convict; proof must be full; it must be conclusive; it must exclude all reasonable question, annihilate all reasonable doubt. On proof short of this, the only verdict must be, not guilty.

Let us now look at the circumstances of the case; let us see how near the prosecution has approached to this clearness, this conclusiveness of guilt. First comes the legal presumption of innocence, excluding all other presumptions, yielding to nothing but proof; nor even to that, unless it be of strength to render mistake absurd and want of guilt incredible. In the next place we have the testimony of those who avowedly were in the expedition, obtained in the only way in which evidence in a foreign country can be taken, by commission. Gentlemen, what stronger, what higher proof need we, can we have? In whichever boat he went, he was, if he went at all, one of nine men, crowded into a narrow compass, men who were hours together, who sat at each other's side, saw each other's faces, heard each other's voices, touched each other's hands and feet. Why is it that he was not seen, recognized, remembered? Yet you have the clear, direct oath made by a portion

of every crew that he was not in their midst. Bear in mind, gentlemen, the story of the prosecution; for I now hold the Attorney-General to his own character of the prisoner. He tells you that the prisoner, beyond a general feeling to repel the invasion, took a deep, a special interest in the Caroline; went to Buffalo to watch her movements, ascertained her designs, returned to Chippewa and made report, circumnavigated the island to detect her arrival, and set on foot the expedition which ended in her destruction. If this be so, if his agency have been so active, his vigilance so sleepless, his influence in bringing about her doom so great, how is it that, known as he must have been to all, none were aware of his presence? He was the life and soul of the enterprise. By what miracle is it, then, that his companions deny his agency, disclaim his fellowship? Has not the prisoner some shield other than the legal presumption of innocence?

Undoubtedly, gentlemen, testimony taken by commission is inferior to oral. You see not the witnesses, hear them not; but is their evidence, therefore, of no weight? By depositions in writing alone, all the immense litigations in chancery are determined; and though such proof be sufficient to enable a defendant to guard his property, shall it be of no avail in protection of his life?

Throughout the trial, the learned Attorney-General has employed himself, perhaps subserved the necessities of his cause, with bitter invective against the commissioners; all have seen with how little truth or justice. The strength of virtue is learned by its trial; the commissions were nearly a fortnight in execution; vigilant counsel in behalf of the People was present; counsel not indifferent to the result of this trial; counsel watchful for misconduct, jealous of partiality, and not unlikely to be even restive under equal justice. Now, what misconduct has been detected? what partiality? what abuse? Simply that, whereas Harris stated he had cast into the vessel two ignited carcasses,* the commissioners returned that he "took a very active part in her destruction!" This variation,

*An instrument of combustion used in war—a species of rocket.

having not the weight of a feather in the cause, aiding nobody, harming nobody, is all, absolutely all that the scrutiny of this most suspicious of agents could detect in the answers to some thousand inquiries fit to be talked about, told of, or wondered at! Gentlemen, what higher proof of good conduct in the commissioners, proof that silences question, destroys the possibility of cavil, could be furnished? An eagerness to detect faults so signally baffled by their being none to detect, proves the depositions not only to have been well taken, but taken in a manner above reproach and beyond exception.

One thing, gentlemen, please to bear in mind. The case against the prisoner is based upon confessions. The Attorney-General has said that he has openly proclaimed his participation in the offense, from the time it was committed up to the following autumn—a period of ten or eleven months. It was by order of Col. McNab that the expedition was undertaken; and yet, to him, McLeod never admitted any agency in the transaction. Now, gentlemen, how did it, how could it occur that he was there engaged? For do not forget that, fresh from the enterprise, a list was made of all who had shared its dangers and transmitted to the Governor, but the prisoner's name was not returned. If the prisoner has proclaimed it on all occasions—at Chippewa, at the Falls, at Niagara—how is it that he has made no admission to his acquaintance? If to Quinby, Myers, and Wheaton, why not to McNab—to him who, of all others, could have given him effectual credit, transmitted his name to the Governor, and procured for him the reward of an enterprise which, the Attorney-General says, he was the earliest to plan, and the most efficient to execute.

But it has been said, and doubtless will be again, that the witnesses whose depositions have been read are accomplices, and therefore of impeached credit. Whether the fact of having been an accomplice be always an impeachment or not, I submit, depends very much on the circumstances in which he swears. If he comes upon the stand and depose against his companions, there is an implied promise of pardon. That is the motive which goes in impeachment of his credit. If he

convict his associate, he is himself placed beyond punishment. If it be in a capital case, then he is bribed to perjury by the love of life; and, therefore, he is interested; he is under an impulse more resistless than any, than all pecuniary considerations can give. But see whether this motive exist here. The men who have thus deposed were not known to have been engaged in the enterprise. Had accident, or any other cause, cast them among us, their agency might have remained undiscovered, and themselves been free from danger, by being safe from detection. Now, however, they are just to the prisoner at the expense of safety. They swear to their own hurt. Their testimony may not only lead to their own detection, but be conclusive evidence of guilt on their trial—making conviction sure and acquittal impossible. Every motive would induce them to silence. They swear against their interest, and, on every principle of law, are entitled to full faith and credit.

But, gentlemen, allow me to look over the history of this case, and see whether the motives which led these men to Schlosser be such as to deprive them of all credit—of all belief with an American jury. It is well known to you—indeed it has been stated in almost every sentence of testimony given in the cause—that it had its origin in high national questions. Throughout both the Canadas discontent, deep-seated, has prevailed: whether the cause was right or wrong, is not for us to determine. With that, on this occasion, we have nothing to do. Resort was had to arms, but with no success to the insurgents. After the failure of the movement on Toronto, peace was restored. Of the insurgents, a few fled to the United States, and, after a fortnight, returned with such recruits as could be obtained, to Navy Island. Their object was war; and upon the character of this state of society, some little light is thrown by the testimony already in the cause. How furious and bloody it must ever be, you can imagine from the transactions at Schlosser, and but faintly imagine; for, of the accumulated atrocities of a whole campaign, to what part would this little affair, horrid as it seems in the detail, be equal?

Over all the province uncertainty and alarm, the most poign-

ant and intense, were felt. Had its yeomanry been as rife for revolt as this movement assumed, had they been ready to seize the musket and brand, no tongue can paint the horrors. A civil war, of all the most sanguinary, amid the snows and frosts of a Canadian winter, a brutal soldiery, and a peasantry soon to become more brutal still—barbarized by violence! Horrors, too, all in vain! For, of what avail? Two hundred and fifty thousand souls—giving the insurgents one half the population—what could they do against the other half, and all Britain beside! At the first relenting of spring—if they could have held out so long—the whole had vanished, as the tempest vanishes, leaving the sky clear, but desolation all around.

Avowedly to kindle such a war, so mad in its origin, so hopeless in its results, Navy Island was seized from the American shore, in part at least by American citizens, organized on American soil, and headed by an American leader. A strange spectacle this for a land of law, bound by treaties which itself had made! Why this interference with another state? Why these efforts to break a peace which it was the interest of all to keep, and to bring on a war which all had a like interest to shun? The answer, while it will disclose the interests which have fermented through the case against the prisoner, will carry us another step in its progress.

When the movement on Toronto, by the weakness of the insurgents, or the incapacity of their leaders, or by utter destitution of all just cause, had failed, then followed a general rush to our shores. Had they come as Emmet and Samson, or as their own Bidwell came, to find a home, to mingle with us and become of us, to embark in our vessel and share her destiny, they had been welcome. For such, our ports are wide, our arms open. Let them come, share our institutions, taste with us the enjoyments and endure with us the trials of our course. For such objects many did come, have sought a home and found it in a land of warm friendships and generous sympathies. Others, too, came, but with no such aims; they came not to reside, but to visit; not to share our fortunes, but to im-

plicate us in theirs; not to enjoy our peace, but to persuade us to wage their war—such war as I have described! They spoke as in unmerited distress, and were heard with sympathy; they talked of freedom, a dear word to Americans; and this, generous hearts, unregulated by sound heads, though they had the power to achieve, the courage to fight for, and the wisdom to preserve. With Great Britain we are at peace; hither they came for recruits, thus disregarding the law of nations. The enlistment of soldiers here for war abroad, was by statute a high misdemeanor. This, they caused our citizens to disregard—thus to the meanness of broken faith, adding the guilt of violated law. From the consequences of crime at home, we gave them a shelter; they repaid us by deluding our people and trampling our statutes. How this mixture of enthusiasm and crime resulted, we know. In vain the National Executive issued his proclamation, enforcing order and commanding peace. Along all the border the same high passions had risen. Public meetings were held, arms contributed, volunteers enlisted, cannon stolen, the arsenal at Batavia plundered; and law had no voice to rebuke, and no power to arrest the wild outbreak.

Through Schlosser the influence of all this was to be carried into Canada. Navy Island once occupied, the next step was to form a provisional government, the object being not an immediate descent, but to organize, to fortify the post, establish headquarters, to give the revolutionary banner a chance at the sun, and then to await the expected uprising which it was the sole purpose of the movement to create and sustain. Gentlemen, I warn you against the error to which all men contemplating past events are exposed. Time, it is true, has cleared the atmosphere; things have since taken their proper size and color. In the distinguished head of this frail sister of nations, we now behold only a pardoned convict; and in his military chief—a convict also, pardoned or otherwise—nothing else but a name, another has made illustrious by a gallant adventure on Canadian soil; and, with some few exceptions, in the men who swelled their ranks, nothing but the collected

idleness, vice, and profligacy of the border—kindly named by the Attorney-General “the more reckless of our young men”—men whom nothing good could rally, nothing bad disperse. Such, after four years of sunlight on their character, we behold them now: not such were they then beheld. Bad, indeed, they were known to be; but this knowledge only deepened the terror their projects had created. If, even when guided by the wisdom and purified by the virtues of Washington, aided by the self-restraint of a whole land, our revolution was traced in blood and ruin, what must have been a war in Canada, conducted by such leaders, backed by such a soldiery?

Gentlemen, standing here on this solemn occasion, speaking to interests which touch this country, not only, but reach beyond the Atlantic, and accountable for what I utter, not to man, but to Him alone whose justice we are attempting to administer, I am not at liberty to employ other than the language of truth. I say, then, that in a country which has Plattsburgh and New Orleans on its map, none can say, none shall dare say, that resistance to invasion, of whatever kind, incited by whatever motive, is aught but the highest virtue. To come to the rescue, to meet the foe on the beach, and to keep the soil stainless of hostile tread, is a holy call uttered in all lands and appealing to all hearts, and loudest to the noblest. At this call came forth those assembled at Chippewa; and such as in like circumstances we should have gone—such they came. Not the squadron, well-equipped and trained to the field; not the close column, stout as rock to the assault, and though liable to fall, yet falling where they met the foe, sure to remain a rampart still. Such were not at hand; but men, stepping out of the common walks of life, on business which, as the evidence has so often told you, brought all other business to a pause. The artisan from the shop, the merchant from the store, the sheriff quitting his writs, and the legislator, the council chamber, all undisciplined, but all true, each, like Young Gilkinson, seeking some, but as yet unknowing what, way to make his right arm felt in the general cause. Thousands of such, twenty-seven years ago, were seen rushing along the Green Hills of Ver-

mont, soon to return chagrined and mortified that the foe was already routed, they having no chance in the fight, no share in the glory.

But mark the contrast! those boys of the mountain, in their march to the field, left behind a people of steadfast faith: no danger that the foe in front would be aided by a deadlier foe in the rear. In that direction all was safe. Not so in Canada. It is the curse of civil strife, that none know in whom to confide. All hearts become haunts of suspicion and dread. He who smiles with you now, may, an hour hence, be your assassin. He who yesterday partook of the hospitality of your board, may, tonight, riot in the destruction of your dwelling. Such was the state of society these men left behind. From Navy Island had gone forth a proclamation, invoking revolt, offering a reward for the governor's head, and promising, as a stimulus to treason, a distribution of the public domain. Such were the incitements to revolt; and it might come, come any moment, but come only to be marked by desolation and crushed in blood.

The island, though far from impregnable, was yet difficult to assail, standing in a current of six miles an hour, guarded by twelve cannon, occupied by a force of hundreds and supported from the United States in the rear, with all that private contribution and plunder from the public could furnish. A regular siege was therefore begun, and pressed with such energy and skill as were at command. Cut off from the Canadian main, the whole strength of the post lay in the passage to the American shore. While that was open, the island was invincible by its undisciplined enemy; the moment it was closed, dispersion or starvation became inevitable. Hither, then, all attention was directed; and the *Caroline* appeared, not on a transient call, but for permanent employment, after negotiation and with a definite object. I know that Wells has sought to give this adventure the character of a private enterprise, undertaken for mere gain. Be it so. The danger arising from it to the Canadians was the same as if the vessel had been owned by the islanders. All they could have used her for had

been to convey to them arms, and provisions, and munitions of war, and fresh accessions of strength. And all this she performed. Whether owned by Wells or Van Rensselaer, was all the same. She took the character of the enterprise she aided. For, "if I lay siege to a place," says Vattel, "I have a right to treat as enemies all who attempt to enter it, or carry anything to the besieged without my leave," Wells, then, and his vessel and her crew, were to be treated as enemies, embarked in one and the same cause with Van Rensselaer, taking the same risks, assuming the same responsibilities, and exposed to the same retributions.

A private enterprise! What but such was that of any man on the island? By what public authority were they acting? Under that of the United States?—that gathering was hostile; we at peace. Under that of Canada?—but she was resisting them as bandits, rebels, pirates. What was Van Rensselaer's but a private enterprise? what George Howel's? what Sutherland's? what any man's? What was the whole undertaking but a combination of private enterprises, acknowledged by no government, sanctioned by no law? A partnership of individuals, each contributing something to the capital stock, to be recompensed by an equivalent in the dividends. Howel giving his militia colonel's commission for a regiment; Sutherland his lawyer's profession, such as it was, for a brigade; Van Rensselaer, his uncle's name for the chief command; and Wells, his steamboat for passengers' fare?—each promoting the common object for private ends, some seeking profit, some honor, but all impatient for the dawn of that auspicious morn when they should no longer be pensioners on the bounty of the American border, but be transferred to the Canadian main, there to subsist on—what? Without property, without supplies, having no treasury, no credit, no clothing for a winter campaign, on what could they subsist? how be fed, how clad, how paid, but by plunder and rapine? How be sheltered, but by ejecting from their dwellings the inhabitants in mid-winter? Besides these, they had, could have, no hope; without

these, instant death, not by the people invaded, but death by cold, death by hunger, awaited them.

Such is the cause which the Attorney-General has sought to dignify by allusion to the great and good of a day that is past! So the time has come, has it, gentlemen, when the raked-up ruffianage of two frontiers, banded for robbery, receivers of stolen arms, dealing out murder with weapons taken from an arsenal which a burglary had opened, can suggest to our highest vindicator of broken law nothing more appropriate than the Greek and American revolutions—the one ennobled by the genius of Byron, the other by the self-devotion of La Fayette? Gentlemen, it is forgetting what human nature is—what the love of kindred and home is—what the love of country is, to suppose the Canadians to look calmly on and behold all these horrors in deliberate and systematic preparation, and yet feel no desire to arrest their progress. Over all the broad surface of the globe, not one spot is to be found where man is so degenerate as not to stand fast at the call of such a duty. What other lesson is taught in our own forests, west or south, by the whoop from the thicket or everglade? Touch with hostile foot one worthless sand of Arabia, and the careering steeds and flashing cimeters which gird the land round, will tell that those deserts have homes, and that the rude dwellers there are men. The earth over, in civilized life or rude, wherever man breathes and a foe dare approach, nature has but one impulse, man one voice: “From Him who spread out that broad arch above and this wide surface beneath came this scant substance, this home, and these little ones—all I have, and all I hope, and by that high title I will defend them.” And Him I pray that, whatever else may befall, whatever other calamity be in store, to this high emotion the first rebuke be never administered by an American jury, holding that those who came forth for their country at such a time and against such a foe, are for that, and for no other cause, unworthy of belief under oath.

I do not apologize for their entrance of our territory—no need to do so; but I do say their end was good, their motive holy. The enemy they sought they had a right to strike. The

error was in crossing a line no eye ever saw, no compass ever ran. They may have erred and mistook the law, as the President and his cabinet have, it seems, mistaken it—as our wisest jurists, as Great Britain herself, as the enlightened public opinion of all Europe mistakes it still. No time to consult Grotius had those men. They were to act, act on the instant. For, to keep in view all the while that these operations, not only on the island, but on our whole frontier, had as their basis that the materials for a widespread insurrection existed in the province. It was this that the whole excitement rested upon. That such materials existed, there was evidence. If this evidence were true, and no human being at the time detected its falsity, every hour of delay at Chippewa was an hour of aggravated danger. If it were true, every trip made by the Caroline across those waters hastened the catastrophe. Something, therefore, needed to be done; something without delay; something to close that passage; something to dash the rising revolt, if revolt had begun to rise. Such was the need, such the motives to the attack at Schlosser. Impeached, then, are these men? Their credit, is it impaired? All I ask is, that their testimony may be received by you and credited as the depositions of other men would be received and credited. If you accord to them this degree of trust, how is the presence of the prisoner at Schlosser to be made out? What stronger proof of innocence than this could be hoped? Yet it is the least of our case. Still little as it is, it wholly repels the possibility of guilt.

But the prosecutors themselves have thrown their own case into doubt. Why did the prisoner, on quitting Davis', leave word for his brother that he had gone to Niagara? What could have been the motive? Unquestionably, not concealment; for if there be no mistake, no falsehood, in the proof against him, he went openly with the crowd which assembled to see the expedition embark; nay, himself embarked in the very presence of the man with whom he had left the message. Why, too, did he order his horse? Surely this is not the usual way of passage from Chippewa to Schlosser. Surely there is no proof that the Caroline was attacked by any one

on horseback. Whither was the horse led? Where left? Certainly these are not badges of guilt, unless it be shown that they were used for deception. But this is not shown. Unexplained, they are proofs of innocence; yet unexplained they are. Is this nothing?

But we have still other helps from the People's case. To prove the object of the prisoner's visit to Buffalo, and for what end he went round the island, his own declarations have been offered. Undoubtedly they are evidence, but they must all be taken together. Made at the same time, they are all evidence, or none. What in them works for him is to be credited, as well as what against him. These declarations, then, show why his horse was called for, where he went, with whom he went, how long he stayed, and when he returned. Is this nothing? Creates it, no doubt? None? So much for the evidence of innocence given by the prosecution. Now for our own.

That winter Mr. Press was at Chippewa but once. The same evening he returned to his home in Niagara, eighteen miles distant, and the next morning heard for the first time that the Caroline was destroyed. Does not that fix the day? But he had been to Chippewa on business, received money, charged it to himself on his partnership books: there stands the charge now, entered the day the service was rendered, the 29th of December; preceded by charges of the previous, followed by those of the subsequent day, all in the usual course of entry. Does not that fix the day? When at Chippewa, Mr. Press dined with Captain Stocking, visited with him the fortifications, and together saw the Caroline plying between the island and Schlosser, the first, last, and only time they ever beheld her. That night she took her blazing course down the rapids and over the cataract. Does not this fix the day? On that evening the prisoner accompanied Mr. Press to Stamford, six miles. This shows where he went, does it not? The night the Caroline was destroyed Colonel Cameron slept in Chippewa, and at nine in the morning carried to Stamford the intelligence of her destruction. From him Captain Morrison received the news, and communicated

it to the prisoner in the presence of the whole family. This family, four in number, all testify that the prisoner took tea with them the evening before, remained up till past 12 o'clock, tarried all night, breakfasted with them in the morning, and left for Chippewa about 10. Need I allude to Judge McLean, who met him returning? to young Gilkinson, who rode with him through Chippewa up to the head of Navy Island?

Gentlemen, can there be a possibility that the prisoner was at Schlosser? Can the presence of a man at any place be more conclusively proved than McLeod's at Stamford? The whole ground is covered. Can any man, you, or you, prove where you were ten days ago by stronger evidence than this?

It has already been intimated, and will be openly said by the Attorney-General, that the defense of an *alibi* is suspicious, the resort of rogues, and should be regarded by a jury with great jealousy. Be as jealous as you please, gentlemen. Were you indicted for the same offense, what could your defense be, but an *alibi*? Bear in mind, that presence at Schlosser was crime; and being away, the only innocence. Now what defense could every innocent man on earth interpose save only that he was not present? And what is that but an *alibi*?

Thus we see the situation in which the prisoner stands; how he is fortified, first, by the presumption of innocence, and then by the testimony of those by whom the crime, as it is called, was committed; next by the witnesses for the People, showing that he called for his horse and left; and lastly, by his own, proving where he went, how long he tarried, and when he returned. Such, gentlemen, is the prisoner's defense, such the proof by which it is sustained.

Now, let us look at the prosecution, and see whether there be a reasonable doubt, not of guilt, for that is out of the question, but of innocence.

It was said by the Court before you were impanelled, that you have nothing to do with consequences. In one point of view this is true, in another, erroneous. If the prisoner be proved guilty, by testimony which excludes doubt, leaving

no chance of innocence, coming from witnesses who have had fair opportunity to see and clear memories to retain the facts to which they depose, and of unimpeached veracity—if his guilt be established by such testimony, then it is true you have nothing to do with the consequences of conviction. It is your duty to give a verdict of guilty. Though from it war should come, though our commerce should be swept from the ocean, our frontiers be desolated, and the flames of war blaze up over all our land, your duty is a plain one. Should you falter, suffer yourselves to be bought off from duty even by your love of country, though all the nation might rise up and call you blessed, still you would commit a crime for which He whose justice you are administering, would at a future day call you to a terrible account.

But, though you may not swerve from duty by fear of consequences, you must weigh the credibility of witnesses. It is a humiliating truth, but still a truth, that human testimony is swayed by human desires. If war is to come from your verdict, then it is your duty to look whether the witnesses who have appeared one after another on the stand, did not come moved by the desire to produce this consequence. These same men, by whom Navy Island was seized, are still in our midst; nay, before us now, watching with deepest interest the progress of this cause. If three years ago war was an object, is it not so now? If Van Rensselaer were then a valuable acquisition, would not the commander-in-chief of our national army be one more valuable still? The motive exists yet stronger now than then. It is now almost a certainty that the conviction and execution of the prisoner would lead to hostility. Now is the last opportunity of those who have so long infested our border. Failing now, the chances are, that they fail forever. Perhaps those who have heretofore been deterred from their purposes by no fear of crime, may now falter at a quiet unobtrusive perjury, easy to commit, impossible to punish, the rewards of which would be the gratification of hopes so long cherished, so often deferred. Whether they have thus faltered, is a question for you, and you alone, to determine.

Now, gentlemen, allow me to review hastily the testimony against the prisoner. The first witness is Drown; his evidence is important, if true. On that fatal night, when the destroyers of the *Caroline* were disembarking, the sky covered with clouds, no moon, no snow, no light of any description, this witness saw the prisoner at the distance of ten feet, no nearer, and recognized him. "Are you sure it was McLeod?" said the Attorney-General. "As sure as that he sits there!" That statement shows what credit the witness deserves. At the distance of ten feet, and in such a night, could he have been as certain that the man he saw, if he saw any, was the prisoner, as he was, on the stand, at a shorter distance, by daylight, and with a full opportunity to distinguish every lineament of his countenance? On all these questions of identity, the severest scrutiny must be employed. How infinite the diversities of the human countenance! And yet how difficult it is to distinguish, at a short distance, the individual, unless the light be clear and the acquaintance intimate! The degree of light, we know; but what was the intimacy? Of the one, the residence was at Niagara; of the other, at Chippewa, eighteen miles asunder. Their occupations as unlike as their residence: the witness a teamster, the prisoner a deputy sheriff; and they had never spoken together. And yet he dare swear that the man he saw in that darkness was as surely McLeod as the one he looked down upon from the stand! The last three nights of this trial have been, in darkness, in the lowering state of the atmosphere, the want of snow and moon, and in an occasional star beaming through some fissure in the clouds, like the one to which all this testimony relates. And did not the thought occur to every one of you—I know it did, as you left court at the late hours of adjournment—how utterly uncertain, how worse than uncertain, was all the testimony tending to show the prisoner at Chippewa and not at Stamford? This witness further deposed that on the ensuing morning, between daylight and sunrise, he saw on the stoop of Davis' tavern a man who, he was equally sure, was McLeod, five or six rods off; and on hearing that he had been wounded, went there to

learn the extent; but the prisoner had vanished and could nowhere be found! Such evidence needed not the impeachment it has received from the evidence of Mr. Bates, that this witness had denied all knowledge implicating the prisoner with the transaction.

The next is the witness Parke. At the same hour of midnight darkness, and with no better opportunities of correct vision, he saw McLeod embark for Schlosser. Like Drown, too, he saw somebody at the same emphatic period between daylight and sunrise, at the same distance of five or six rods—not, however, on the tavern steps, but on the public square; and this somebody he of course took to be McLeod.

Gentlemen, than these recollections of time, long past, nothing can be more unsatisfactory, nothing more suspicious. All hours, all days, all years are respectively alike, and can be distinguished from each other only by events connected with them. By what magic is it, then, that the witnesses are enabled to remember the precise hour of the exact day when they may have looked upon the prisoner? How has it happened that his bare presence has formed an era in so many lives? For any reason they have assigned, it might have been as well a month earlier or later, as at the exact minute assigned. Parke gives none; Hinman none; Corson none; nor Caswell; they are very accurate in seeing him in the evening, a little later than our proof of his departure, and a little earlier in the morning than our proof of his return. All right and proper, certainly, if it be true; but they assign no reason for us to believe it true—no cause for remembrance—none for the discrimination. They give us no assurance against mistake, unless the absence of everything likely to fix recollection connected with the unwavering positiveness with which they swear to time, may justly assure us that though mistake be absent, yet perjury is present doing its office.

Now, allow me to examine Corson's testimony. Of him there can be but one opinion. He is detected in what he must have known to be a wilful and deliberate perjury. Of this there can be no question or mistake. He was called, you

remember, to depose to that stereotyped confession repeated by every witness without the slightest variation. The time, between daylight and sunrise; the place, Davis' stoop; the language, "I have killed one d—d Yankee." On cross-examination, the usual test of safe recollection was applied: "Who were present?" He could recollect none at first, but on being pressed, he replied, "It strikes me Mr. Caswell was." My associate suspected Caswell to be a witness, and to that inquiry, Corson answered in the affirmative. "Have you conversed with him about this suit?" "No." You remember how it came out that on that very morning, before being sworn, he and Caswell had talked over together what their respective evidence was to be; both were to swear they saw the prisoner come from the barroom at nine in the evening; both to his being on the stoop in the morning; both to that same murderous confession: "Now, sir, when did it first occur to you that Caswell was present?" "This moment!" How is it, gentlemen, that when Caswell said he was to swear to the same confession, uttered at the same time and in the same place, this witness never suspected him to have been present? If their tale be all concerted and all false, the absence of such a suspicion is easily understood. But then there would be perjury in swearing to Caswell's presence, and perjury, at all events, in denying all conversation with him; unless, indeed, there be charity enough to suppose that, although he may forget what passes in the morning, he can nevertheless remember with infallible accuracy conversations held four years ago, the 30th day of December, between daylight and sunrise.

This witness also disposes of Caswell; for, though he denies all communication with Corson, yet he swears to the same facts that Corson had stated he would, thus convicting himself and unfolding the turpitude of both. These two witnesses, therefore, annihilate each other by entangling themselves in the same net of falsehood they had spread for the prisoner.

A remarkable place in your attention is deserved by the witness Meyers. Other confessions may have been dropped

unawares, at least without due consideration of their importance; but this has a pageantry smacking of the sublime. It was at the Falls, ten days after the destruction of the *Caroline*—sixty persons in the room, mostly soldiers. All is deep silence. Suddenly, some one makes proclamation, "Where is the man that shot Amos Durfee?" Forth steps the prisoner, draws a horseman's pistol from within the breast of his coat, and responds: "I'm the man, and this the pistol that did it!"—then puts back that murderous engine, and pulls out a sword with six inches of blood on the point, and continues, "That is Yankee blood"—prefixing to the "Yankee," with due loyalty, the epithet damned, and then puts back his sword. Here the pageant ends; but not the testimony of this witness. How he discovered the prisoner's name should not be forgotten. The witness, you will remember, got into some difficulty at the stable, and had well nigh been arrested. After a parley, one of the soldiers said to the prisoner, "Alexander McLeod, is it best to let him go?" But he had before stated that McLeod was called Sandy as well as Alexander. His honor took up the question, and desired the form of expression in which that name also occurred. It was thus: "Sandy McLeod, let us go in and take something!" Such is the marvelous testimony of this witness—stupid in mind, stupid in feature, more stupid yet in his ridiculous falsehood. Is the story thus told entitled to anything but contempt? Is it not trifling with the solemnity of the court, with human life, to introduce evidence so utterly without pretense of truth? A horseman's pistol carried in this way! Human blood so carefully hoarded! The whole name thus unaccountably used in familiar conversation! All this, too, told by a wretch too besotted to have been able to repeat the story had it actually occurred.

There are circumstances, gentlemen, by which perjury may always be detected. This offense is nothing new on the earth: it is easily committed, always hard to discover. It has, therefore, long received the attention of courts of jus-

tice and sages of the law; and from their examination certain rules, certain texts have been framed. One of almost invariable certainty is, that the witness who deposes to a transaction falsely, never places at the time or place men by whom he can be contradicted. The conversation will be described as either alone or in the presence of persons unknown, unless the witness, like Corson, place there some one equally false, by whom he expects to be backed. But there will be no other there to throw light on the transaction, to correct any mistake, or to repel the falsehood. This is the evidence, the uniform evidence, of perjury. Now, take this rule and apply it to every witness. In the morning after the destruction, the prisoner confesses to a room-full—nobody to be named but Anson, who proves it!—afterwards again, on the stoop, to a crowd; no names disclosed but those of Corson and Caswell!—again on the Chippewa Bridge, to a company of soldiers. Quinby knew the prisoner, and knew nobody else! In every instance there was no man by whom the falsehood could be detected!—never before so complete a demonstration of the force of that rule as this case furnishes. At the Falls, Meyers can recollect no one from the whole sixty; and at Niagara, the confession was too precious to be enjoyed by any one known or unknown except Wheaton. Throughout, whenever a confession has been proved, no man has been located near, of whom we could inquire, to detect the falsehood, or to punish the perjurer. The face of the prisoner can be remembered, but no other face!—his words, but the words of no other! Wilson is another illustration: nobody vouched but Raincock. Yet Raincock just as certainly heard that confession as the prisoner made it! The witness had the same recollection of the one as of the other. Why should he not? The admission made by the latter was given in answer to an inquiry put by the former. And surely it was very right in the witness to remember both with equal certainty. The idea was one and indivisible. So far, this was an apparent exception; only apparent, for the wit-

ness was constrained to admit that Raincock had absconded ! And when it came out afterwards that he had absconded to Europe months before the destruction of the *Caroline*, the idea, so entirely one and indivisible, certainly became divided. This witness has other vouchers of integrity as well as disinterestedness. He refused to answer whether he had harbored the infamous Lett ; whether he had set on foot a military expedition against Canada, and whether he belonged to any secret society aiming to produce a rupture between this country and Great Britain. But he did admit that he had given two hundred dollars to aid the "patriot" cause.

Here is another witness whose story is to be assumed as false—false at the beginning, false at the conclusion, and false in all its details. I refer to Stevens. On the night of the destruction, he says he saw the prisoner embark, and the expedition start ; not from the canal, but the beacon ; not seven, but three boats, and no more ; and not ascend the river a mile, but put right out of sight towards Schlosser. This testimony is valuable for no other purpose than to show that perjury is rife in the cause ; but this is the boldest of all, for, in every respect, it contradicts the proof—the whole of it—given on both sides.

Next comes the distinguished Quinby. He has acquired reputation elsewhere as well as here. At the county seat in Warren, twenty-six miles from his home, and after a residence of only three years, the vigor of his oath has gained for him a fame amounting to a proverb—"If a witness is wanted to swear right through, call Quinby," is the tribute there accorded by common consent to his virtues. But though his neighbors had not brought us the proverb, his conduct here, I submit, would have enabled us to have formed one of the same kind for ourselves. High as is the fame of his veracity, his intelligence seems to be much on a level with that of Meyers. The day before the expedition, he came to Chippewa with hay ; could not tell to whom he sold it, nor how much, where weighed, or where deliv-

ered. Entered Davis' barroom at nine, saw the prisoner come out—had seen him often before—could not tell where—nor why he remembered it now. Walked home two miles before ten, was back in the morning, "between daylight and sunrise," to get his pay, and heard the prisoner confess on Chippewa bridge, to a troop of Coburg soldiers. My associate asked, "Why did you leave home so early in the morning?" The miserable idiot thought he had taken wrong lodgings, and that to be back to Chippewa at the indispensable hour between daylight and sunrise, would be too quick an operation. He faltered. At length: "I did not go home!" "Not home! Where then?" "To Mr. Pettis." "Where's that?" "In Sodom"—about half way home, where he had never stayed before or since. Then came the wretched story of going to the commissary's for his pay before sunrise, though he did not expect to find him in his office; and of his wanderings about, unpaid and unfed, unable to name one man he saw, or one word he heard, until he safely deposited himself at home about noon—every thing forgotten, save that one ineffaceable confession deeply graven in his memory, that the prisoner had slain a Yankee! The exigencies of the prosecution needed such a witness. Quinby came, swore right through, and not only sustained his previous reputation, but won a fresh laurel to his brow.

Why need I allude to Wheaton? He, too, heard a confession. He had left his residence, thirty-five miles from Toronto, on business at Lockport; arrived in Niagara; went to the dock; heard the prisoner, whom he had never before seen, nor since, make a confession; used no effort to cross the river; changed his mind; went right back home again, able to give no just reason for the change; no account of the business he so unaccountably left untouched, making a journey to and fro of one hundred and forty miles for nothing. Why speak of Anson, the wandering journeyman? He, too, just at break of day, in a room where no lights were burning, before an unknown audience, heard an unusual controversy, "which had done the greatest crime;" and

heard, too, then and there the prisoner confess, brandishing a bloody pistol;—a piece of information which slumbered in his mind three years for lack of “a convenient opportunity to tell of it;” and was first communicated to the world on the day the witness rode eighteen miles express to make the prisoner’s commitment by the examining magistrate sure.

Such, gentlemen, is the evidence on which you are called to find a verdict of guilty. Much of it consists in declarations. If the prisoner be as communicative as he is represented to be—if he be as anxious to have the world know his participation in the affair of the Caroline, as the Attorney-General would have us suppose, and as we have a right to believe, if the evidence be true, it is a little remarkable that a more full and detailed account of the transaction cannot be procured. These alleged confessions run through a period of eleven months. His agency, you have been told, was prominent, and certainly there can be no complaint of want of frankness in his communications. Men of this kind have acquaintances, and are apt to narrate the transactions in which they have engaged, commencing at the beginning and going along step by step. Who ever heard of a man engaged in an event of great interest, producing high and deep excitement on both sides of the frontier, repeating one single sentence at all times and places, and never entering more fully into the history? It is incredible; it never did, it never can happen; it violates every law of human nature, every impulse of human vanity. Especially so, in a transaction like this. It was a deed calculated to strike—it was done amid danger—the passage was in a swift current, almost on the slide of the rapids. Navy Island behind, the cataract below; one rod of sweep too much, to avoid the cannon of the former, had plunged the adventurers into the abyss of the latter. Rely upon it, if the prisoner be thus frank, and were engaged in the enterprise, there are men on both sides of the frontier to whom he has spoken; told the whole story, how he got up the expedition, in which

boat, and with whom he went and returned. How happens it there is none of these details? And yet, who does not see, who not feel, how infinitely stronger one such full relation would be than all the loose and casual repetitions of one single sentence, chance-dropped, nobody knows where, nobody can tell why? "Of all kinds of evidence," says Starkie, "that of extrajudicial and casual observations, is the weakest and most unsatisfactory. The necessity for caution cannot be too strongly and emphatically impressed, when particular expressions are detailed in evidence, which were uttered at a remote distance of time. Such evidence is fabricated easily, contradicted with difficulty." Such is the language of the law on the subject of these declarations. And this is the case, if ever one arose, where these solemn cautions should be regarded.

I have now gone over the case. By way of recapitulation, allow me to reverse the transaction—to place the murder in the parlor at Stamford, and the alibi on the Caroline at Schlosser. For in one or the other of these places the prisoner unquestionably was. Give the Attorney-General the proof, showing him at the former, the Morrisons conversing, supping, breakfasting with him; the time determined beyond question or cavil by their recollections not only, but by Press and his account book, by Stocking, McLean, Gilkinson, and Colonel Cameron. Add to this the depositions of the destroyers of the Caroline, denying that the prisoner was among them—witnesses all of clear intelligence and unsuspected integrity. Against proof so full, conclusive, overwhelming, what could avail the midnight visions and twilight fancies, and worse than questionable veracity of men like Drown, Corson, Caswell, Anson, Quinby, and Stevens? Could there be a doubt of guilt? If not, can there be a doubt of innocence now?

I leave the cause. Deep anxiety and alarm for the result of this trial have been felt, but are felt no longer. There is now no danger of war, none even of disturbed foreign relations. Your duty is as delightful as it is easy; in giving

liberty to an innocent man, you give repose to your country. I anticipate a resolute acquittal, which shall satisfy not only the crowds assembled around—not only public justice, but your own consciences now and through life, and bear the scrutiny of the dread hour of final account.

MR. SPENCER, FOR THE PRISONER.

Mr. Spencer. Gentlemen of the Jury: It is the first time in my life that I have ever risen, having in my charge an important trial or defense, when I felt that the remaining duty of counsel, after the evidence was disclosed, was entirely a work of supererogation; and the consciousness that it is so really oppresses me. It seems to enervate the whole system, that circumstances like these should thus attend me, and that I should be obliged to detain a jury whose patience has been largely drawn upon, by commenting on evidence, when, in my deliberate judgment, the evidence has already convinced the understanding of the jury; and their judgment is ripe to be pronounced. But in all this I may be mistaken. It is very possible that my convictions of the evidence of McLeod's innocence are stronger than are yours, or those of any other person who has not been so intimately acquainted with the whole history of this case as I have been. It is because I have no right to remit any exertions which shall lead to the development of truth, and establish the innocence of McLeod, and the securing of your verdict of acquittal, that I will even now attempt to draw further on your patience, and submit such considerations as deserve to be reflected on by you; such as the case calls for, such as the prisoner has a right to demand, and such as our State and our common country may reasonably expect of me. As I took occasion, gentlemen, to remark, in the opening of the defense, this case is one, as the evidence has now disclosed it to be, of greater importance than almost any other ever brought before an American bar for trial. Cases involving the lives of individuals have at all times sufficient interest to awaken the deepest emotions of the human heart; but when we consider

that this is a case involving other interests far beyond the life and death of McLeod, no man having an American heart, beating in an American bosom, can fail to be alive to every consideration that shall lead him to a right conclusion; and equally as jurors and as American citizens, I invoke your attention while I proceed to submit such considerations as I shall address to you.

You, gentlemen, after all which shall be said to you on each side of this case, and after what his Honor, the Judge, shall feel it to be his duty to say to you in giving to you this case, will have charge of a great and responsible duty; on you the whole question finally devolves, and to you will the country look for a proper verdict; and to yourselves, to your own consciences, to our common country, and to our God, are you responsible for the verdict which you may give.

Your duty, until you come to your final deliberation, is that of a patient, attentive hearing, that you may rightly understand all that shall be said, and that you may properly appreciate all that shall be proved. Patience and attention are the first duties which you owe; and, afterward, a careful, deliberate, anxious, conscientious consideration of what has been submitted to your hearing; and when you retire to the jury room for deliberation, then will come the time when a responsibility, the first in importance, will devolve upon you; and it may probably be the last in the long life which you may live. Our duty, gentlemen, as counsel, is altogether of a different character; more perplexing, more exciting, more vexatious, more trying than yours, save perhaps the final responsibility to which a jury may be called, in returning a verdict in a case like this. I allude to this, gentlemen, only because some things have occurred in the progress of this trial which I should have been exceedingly gratified to have avoided. It is very natural—it is very proper—that counsel on either side should feel, in respect to the case committed to their charge. It is fit and proper that the learned counsel who conduct the prosecution for the government, should feel for the advancement of justice. It is natural that they should feel and believe the truth of the case which they spread

before a jury; and, so believing, it is natural that they should disbelieve that set up for the prisoner. On the other hand, you will agree that it is equally natural and proper that the counsel for the accused, having bestowed that attention which their duty requires in the case, should have formed some opinion, or received some certain and firm conviction, upon which they believe they can rely in the question involved. That they should feel thus is proper; believing their own case to be the truth. This case, above all others, presents the alternative that they must believe everything on the other side to be utterly untrue and unfounded. Hence it will have been observed, in the progress of this trial, that there has been some little excitement of feeling; perhaps more than was necessary.

Gentlemen of the jury, I hope you will be spared all your lives from any such excited feelings as have existed on this trial. You may well desire to be strangers to the anxiety which counsel must feel in the preparation of such a case as this. You may not be acquainted with the sleepless nights, and the anxious days, which attend the preparation of a case like this; and I assure you, gentlemen, it would afford you anything but pleasure, unless it be the pleasure which all must feel in the advancement of justice, and in the protection of innocence. You may have observed, in the progress of this trial, in the examination of witnesses, that there seemed to be a want of kindness and charity toward those who have been called to sustain this prosecution; there may have been a rigor and a rigidity of examination to which, perhaps, witnesses should not be subjected who appear here in obedience to the mandate of the law. These are sentiments which will naturally arise in the minds of a jury; and under such circumstances, witnesses always have the sympathy of a jury. It is right and proper that it should be so; to that we do not object. When they seem to be treated with unkindness, with asperity, with rudeness, it is natural that the sympathy of the jury should be excited in behalf of the witnesses, and that prejudice should be excited against the counsel who resort to such a line of duty. But if any such sen-

timents as these have arisen in your minds, I ask you to find an apology for counsel in the extraordinary case which has been presented for your consideration, and you will have less of sympathy for witnesses who have come to swear against the prisoner and to take away his life, than you would in other circumstances and on other occasions.

It is natural, gentlemen, too, that counsel for the prosecution should indulge in a firm belief, on the one hand, of the truth of a case the very opposite of ours, and that they should believe the evidence which they were to adduce to support and sustain the prosecution. They certainly did believe it, or they would not have been capable of introducing one single word of that evidence; and believing that, as they do, it is reasonable that they should manifest some degree of solicitude that it should stand forth unimpeached and uncontradicted, unless truth required it to be contradicted, and it was unworthy of belief by the jury who have finally to pass upon it. On the other hand, before I opened the defense in this case, I was not an entire stranger to its strength and merits; and it had not failed to work strongly on my mind a degree of conviction as to its truth, as strong as that entertained by the counsel for the prosecution. And feeling, as I did, that our cause was the cause of truth, what followed? Why, necessarily, that the case for the prosecution was the case of falsehood. Both cannot stand; and, in grappling for the mastery, one or the other must be overthrown; and your verdict must decide who, in this struggle, shall be overthrown, and who shall stand firm as the rock of ages—firm as truth itself—stand forth to the world sustained by the evidence upon which your verdict shall be founded. And believing, as I do, that ours is the cause of truth, I firmly believe that the cause of the prosecution is untrue; and I am sorry to say, that I firmly believe a large portion of it is not only untrue, which implies mistake and misapprehension, but I hope I shall not be suspected of a want of charity, when I say that I believe a large portion of the case is utterly false; and I desire the word to be understood in its legiti-

mate and strongest sense. I believe it is sought to be upheld by a combination of the rankest perjury that was ever brought into a court of justice since the sun shone on Christendom.

This case, gentlemen, involves not only the life of a fellow-being, but the highest interests of two great nations, in the two hemispheres, which hold the first rank in all Christendom—one common people, speaking one common language; and the object of this prosecution is, to involve these two nations in a bloody war. Believing this—and I doubt the power of my learned adversaries, able as they are, to convince me that such is not the character of the prosecution, and that such are not the reasons and the motives for its being brought—I confess frankly, I felt little charity for those who sought to take the life of McLeod. Such must be my apology for any feeling which may have been exhibited in conducting this defense.

I took occasion, gentlemen of the jury, in opening this defense, to state to you that it would be twofold—the one founded entirely on the broad ground that the killing of Duffee was not murder in any one—that, by the laws of nations, in the exertion of the public force of a country, those acting in obedience to the command of their superiors, in the discharge of a duty which, from the circumstances of the case, seems to devolve upon them, are not subject to arraignment and trial as murderers, though the discharge of that duty be hostile in its nature, and calculated to destroy the life of a fellow-being. That defense, gentlemen of the jury, whether right or wrong—whether it would or would not have been entirely conclusive, if admitted—has, by the direction of the learned Judge who presides over our deliberations, been excluded from our view. Of that judgment it becomes not me to complain; I feel no desire to complain in the progress of this trial.

If the learned Judge has been mistaken in the decision which he has pronounced, in excluding testimony which we in this argument cannot introduce, he cannot be said to have been mistaken without having some authority in his favor;

it cannot be said it is other than an error which has arisen out of the opinions of those whose opinion of the law is binding and obligatory upon the Judge who presides over us. I take occasion to allude to this point merely to say, that with that decision of the learned Judge here, I am not disappointed. I had known him before—I had been in his court before—I had known the habitual respect which he pays to the decisions of the Supreme Court of this State, and properly so. I have not, therefore, been disappointed, that his ruling has excluded this defense from your consideration. What then, gentlemen of the jury, remains? Are we without defense? As far as our Supreme Court have decided, though the Canadian territory had been invaded by a hostile army, which had established a provisional government, and issued a proclamation inviting our subjects and citizens to come to their standard; and although a large band of American citizens had rallied to this standard; though our arsenals had been rifled of their contents; and though the arms of our country had been gathered and collected—batteries erected and opened upon the Canadian main; yet, if the subjects of Canada thought fit to exert their power to overthrow this enemy, and in the exertion of that power dared to put their feet on our soil, they were trespassers; and if they dared to take the life of an American citizen, they were murderers. Although, I say, the Supreme Court of the State of New York have thus decided, have they swept from our possession every defense which can be relied upon for the safe deliverance of McLeod from the bonds which he now endures? No, gentlemen, there is yet another remaining; and it only remains for me to say on this branch of the subject—and I desire it to be understood as well here as everywhere else—that I have no belief, no confidence, in the doctrine of the Supreme Court which has been promulgated in this case. I shall respect it—I shall abide by it—and I shall abide the decision of his Honor here; but, if needs be, I have taken the precaution to be able to review the decision of his Honor here, and to secure the right which will enable me to review the de-

cision of the Supreme Court elsewhere, so that, in the event of McLeod's conviction, if the Supreme Court have been mistaken—if that decision should not be in accordance with the law of the land, it may be reversed, and that established which I believe to be the law of the land—namely, that where there was such a war being carried on, between the British Government and those who waged it on our side of the waters, the British Government might properly exert its power to put down that war, and that those who acted in obedience to the orders of that government, discharged their duty as faithful subjects and citizens, and are not murderers.

I desire it to be understood here, in this courthouse, and by this audience, as well as in this nation, and throughout Christendom—for our doings interest all Christendom—that I do, with all due respect to the Supreme Court of the State of New York, as a member of the bar of the State of New York, protest against the doctrine which has been promulgated as the law of the land. It is not the law of nations—it is not the law of reason—and I, for one, never will submit to it so long as it may be necessary to contend against it for the safety of McLeod. On this trial I submit to it—I will abide by it—I will submit, so far as this trial is concerned, without complaint and without murmur; and I only now refer to that doctrine of the Supreme Court of the State, to express my regret that it should be sent forth as a doctrine springing out of the law of nations, as belligerents in the affairs of war. The remaining ground of defense is that to which I secondly alluded on opening our defense to you. It is one of common occurrence, and may as naturally arise in a case of murder as in any other. Sometimes the books say it is a defense of some suspicion. And we will see what suspicions rest upon this part of the case, before we close the remarks which we have proposed to submit to your consideration. And the books also say, when it is established, it is perfectly conclusive.

His Honor has listened, I doubt not, to this portion of the evidence with all the attention and solicitude which his duty

calls upon him to bestow; and this portion of the defense his Honor will tell you you must alone regard, and he will take pains to exclude from your minds any consideration which can influence your verdict, growing out of the law of nations. Of that I shall make no complaint. When you advance to the question as to the truth of the *alibi*, for, as the opinion of the Supreme Court is understood by his Honor, it becomes his duty to charge you not to look at the law of nations at all—you will look beyond that, and inquire carefully and seek diligently for the truth as it shall exist in other portions of the defense; and when you have found it, you, gentlemen, will embrace it—yes, gentlemen, you will embrace the truth in this case as a treasure, and regard it as apples of gold in pitchers of silver; for, if ever it were desirable that truth should be found, it is now—that you may know where your duty lies.

The true question for your determination is, where was the prisoner at the bar on the night of the 29th of December, 1837? If, as it has been proved on the part of the prosecution, he was at Chippewa, after we took him from there—if he made a portion of the attacking party—if he was one who boarded the *Caroline* at the dead hour of midnight—though his hand dealt not the death-blow, or the pistol which he held sent not forth the deadly bullet—yet, if Durfee received his death, it is murder, and all those who were engaged in the enterprise are implicated. You are to inquire where, in reality, was McLeod at that time? Had he the honor or the disgrace to be engaged in that expedition? If he had, then, under the law, as applied to this case, I confess it will be your duty to find a verdict of guilty. When I make this confession, I must be understood as referring to the law as it has been laid down and established by one of the higher tribunals of the State with reference to this case, but not as I believe it exists in the firm and unshaken principles of the law of nations. This case, gentlemen, presents some features of great peculiarity, to which allusion should be

made, and which you should fully understand and properly appreciate.

It is, that, from the beginning, as I have before had occasion to mention, long before the trial commenced, nay, nearly a year ago the main features of our defense, with nearly every attending circumstance were fully and perfectly known to the counsel for the prosecution; not indeed to the learned gentleman who now has it in charge, but to the counsel for the People.

And further, gentlemen, long since—a month ago, or nearly a month ago—our defense as far as respects the evidence which we have produced from witnesses in Canada—so far as respects our evidence taken by commission, was fully and perfectly known—although generally speaking such evidence should be known to ourselves only; in cases of a high criminal nature especially. Yet have we been driven to exhibit to the world as well as to the counsel for the prosecution, long ago, almost every word of that evidence—almost every word of our defense disclosing every minute lineament of our defense as it has been spread out before you. These depositions were in the hands of our learned adversaries days and days before their witnesses were produced upon the stand here to be sworn; and every word of those depositions had been read (or else our learned adversaries have failed to do their duty, which we do not charge upon them in this instance), and what has been the result?

Every one of those witnesses produced on the part of the government has had conferences with the learned counsel day after day, and night after night; and they have had these conferences with others also; with the counsel it was no more than was fit and proper, to be sure it was the business of counsel to have a previous examination of witnesses: and if they had brought them forward without first ascertaining what their witnesses would prove, I should have no hesitation in saying that they were guilty of a dereliction of duty, but I have no such belief. If I had brought forward witnesses without knowing what they would testify,

I would blush at the omission of an important duty. Neither of us I trust have omitted that portion of our duty. This becomes a high responsibility of counsel in trials of this character and importance; but I allude, gentlemen of the jury, to the fact that the witnesses for the prosecution have been conversed with by other persons than their counsel; I am well convinced of this fact.

This trial has not gone forward without having eyes open to see abroad, without having ears open to hear; and I have reason to believe that there have been what may be called committee rooms in this city, where those witnesses have congregated, and where they have had to read to them, if unable to read themselves, from time to time, a report of the evidence which had been given in the case, and where they have had their minds prepared for the part which they themselves were about to take in the case. And you may be assured there was not one of those witnesses who had not a full knowledge of everything material in the depositions from Canada. I do not believe that the Attorney-General or any one in this city has done it, but do you suppose that the learned Attorney-General for the State of New York, that the District Attorney for the county of Niagara; that the District Attorney for the county of Oneida, and the learned counsel from Buffalo, who was himself one of the committee of vigilance—do you suppose that these are the only persons engaged as counsel to uphold this prosecution—do you suppose that they are the only four engaged in upholding this prosecution? If you do I desire that such a misconception should be removed from your minds. These four gentlemen, learned, able, and eloquent as they are, are but the corporal's guard of the army of conductors of the prosecution, which spreads itself from one of the frontiers to the other.

Generals, colonels, captains, soldiers, all have lent their aid here and their missives have been sent forth in all directions. The postoffice department has been made subservient to their purposes; secret communications have

been successfully kept up, and no effort has been left unexerted which was calculated to secure the conviction of McLeod—and for what? Not, certainly, that they desire the blood of an innocent man should be shed on the scaffold, but that the two countries should be involved in war, and that these persons who cannot on account of their offences return to their own country, may by that means be enabled again to enter Canada, though not as the vanguard, yet as the rearguard of an American army, for the purpose of wresting it from British dominion.

How does it happen, if this be not true, that fresh witnesses spring up on all sides like hydras, gathering fresh strength as the cause proceeds? I do not speak without authority; for after the evidence was closed, and the learned attorney for the District of Niagara was about to leave, I desired him, in all frankness, to declare what witnesses, who appeared on this trial, ever appeared on any former occasion, when the case was under examination. And he was compelled to acknowledge that they were exceedingly few compared with the whole number. How, then, gentlemen, does it happen that in every successive movement of this trial, new witnesses spring up? if it be not that an army such as I have mentioned are at work—not for the purpose of eliciting truth, but of aggregating falsehood, till they add so much weight to falsehood itself as to give it an overwhelming power to crush the truth in its onward progress.

Why, gentlemen, we have not been unmindful of who has been sworn on former occasions; there was in the first instance an examination before Squire Bell—nay, I will go farther back, to the time when witnesses appeared before the grand jury of the county of Niagara, in 1838, shortly after the burning of the *Caroline*, to charge certain persons, residents of Canada, with the offense. We have been furnished with a copy of the testimony on that occasion. There was also an examination before Judge Bowen of the county of Niagara. You have heard, I dare say, gentlemen,

of these examinations, and of the names of the five witnesses who gave testimony on those occasions. But here, gentlemen, we have had a cloud of witnesses—thirty-three have been examined on this trial—and in the nature of their testimony there has been a great and radical change. And think you that these thirty-three who have been examined on the part of the government compose the whole army? Why, gentlemen, there is a *corps de reserve*, which far outnumbered all who have been brought forward into immediate action in the fighting of this battle. This intelligence came to our knowledge long ago, it was legitimately within our possession, and we have come up to it in our preparation, although our learned adversaries never condescended to declare to us who their witnesses were.

Upon those examinations before Squire Bell and Judge Bowen, were the principal witnesses to prove the *abbé*. They were examined and though not so fully nor so carefully, as in a court of justice, still, they gave the leading features of the case as it exists on our side, and so strong was the evidence before Judge Bowen, showing that McLeod had no participation in the affair, that he determined to release him on his recognizance for his appearance. But as it happens in that district of the country, an appeal lies from a judicial officer to a popular assembly. Thank heaven, we have no evidence that such an appeal will be brought here, or if brought, that it will be entertained. No artillery or martial music will be brought here—no artillery will be planted in front of the prison door to coerce us in our decision—no midnight mob assembled to the notes of martial music has the power to exert an influence over our deliberations!

You have an easier duty to perform than had Judge Bowen on that occasion. You will have it in your power to open the prison doors and set the captive free; if in your deliberate judgments you determine that justice requires that you should do so, without fear of popular tumult: and it is your duty—justice requires it, without the fear of out-

rage from the populace assembled for the purpose of murder and rapine. You will be able to render your verdict as the result of your deliberate considerations—you will not feel yourselves called upon as did that high functionary, to apologize for the deliberate judgment which you have formed. No, gentlemen, Utica, Oneida, New York, America, itself, I hope, will be saved from another exhibition so disgraceful to our country and our laws.

Thus, gentlemen, you perceive that, from the beginning, the opposite counsel have been possessed of our whole case, and every witness has been well informed of it, and I challenge any man of ordinary capacity, to wink so hard as not to see that these witnesses have shaped and framed their testimony in conformity to the case.

They knew the exact time when our testimony takes McLeod from Chippewa, and returns him there; they knew full well the testimony which fills up the intermediate space from the moment when he left Chippewa until he returned there again. And hence the whole strength of the prosecution has been brought to show that our testimony is false, and conjured up for the sake of saving the life of an individual; while on the other hand, the evidence on the part of the prosecution is true as holy writ. These witnesses from the ends of the earth, come like angels of heaven to speak the truth, as if the light of heaven was, by their voices, to be reflected upon the case before you, and you are not to doubt that it is all true. If so, take it, and give your verdict, and answer to your country for the consequences.

But if I do not mistake the evidence, and my own feeble powers in unraveling evidence, I shall be able to show you that it has been made up of the blackest perjury that was ever brought to bear upon a trial. Indulge me, gentlemen, in another channel of remark, before I come to the unpleasant duty of examining these witnesses one by one. It is, gentlemen—and it is not the first time that I have said it—that there can be no truth whatever in the one side or

the other of this case. It presents a singular instance that it is impossible for human ingenuity to reconcile that both are true, or both may be believed to be true, so as to furnish an apology for witnesses who have been brought to sustain one side or the other—it is impossible.

To Him alone who gave us our existence, can be ascribed the attribute of ubiquity. While tabernacled in clay, we are limited to a single spot at the same instant of time. No man is able, while thus living, to be at Chippewa and at Stamford at the same moment. McLeod was not at Stamford at all, if he had the slightest participation in the destruction of the *Caroline*, or in taking the life of *Durfee*. He was not at Chippewa on the night of the 29th of December, 1837, if he were at Stamford, as we maintain he was. It follows, therefore, gentlemen of the jury, that, painful as must be the duty, you cannot escape its discharge; you must find that either the one side or the other of the evidence which has been adduced before you is utterly false—a sheer fabrication, got up to answer the purposes of the present trial. Now, gentlemen, allow me to ask what motive could there be, for the witnesses on the part of the defense to come forward and fabricate falsehoods, while, on the other hand, you have seen exhibited in those witnesses, again and again, motives strong in death, to give success to this prosecution, that their own darling object of involving our country in a war with Great Britain may be accomplished. I charge it upon them unhesitatingly. With few exceptions, if any, I believe, most solemnly, that they are every one of them engaged in the enterprise which by many has been called the patriotic enterprise, which has been undertaken to get up a war and carry it into Canada. All their witnesses are of this character and description; if there are any exceptions they do not occur to me at this moment. Many of them are members of those secret lodges, of whose objects and purposes we are ignorant. And I am not addressing men who can inform me of their objects. They themselves know, and they keep the secrets, except

so far as their public exhibitions disclose them. Bound by frightful oaths to act in concert for the accomplishment of that which they dare not disclose, for fear of being subjected to punishment by the laws, they certainly cannot complain of us if we judge of them by their fruits. And what are those fruits? In the first place the contributions of money, which is the sinew of war, to carry on their unholy purposes; next, the contribution of personal services encountering danger, and cold, and hunger; also the contribution of food and raiment, munitions of war—every species of material necessary to carry on war against our neighbors.

All this has been done by these men who compose these secret societies. Can you desire to have stronger evidence than the very secrecy of their proceedings. These men dare not give publicity to their doings; but they are kept a profound secret, under the sanction of an unholy oath. Does virtue, truth, and true honesty and patriotism, require this: that a man's motives should be buried in the dark, or locked up in impenetrable obscurity? No, gentlemen, virtue and honesty need no concealment. A virtuous action may be performed, without putting him who performed it to the blush—without exciting one uneasy moment. But these men take the witness stand, and on their oaths declare that they dare not confess the nature of their society's oaths, for fear it should expose them to a criminal prosecution; and yet they expect to obtain credence from an intelligent jury! Tell it not in Gath; publish it not in the streets of Askelon!

No such thing ever finds belief in the honest heart of an intelligent man. These men, gentlemen, who have, by their oaths and associations, given protection and security to a notorious felon who, after conviction, had escaped from punishment before he reached the state prison, take the stand and declare that they dare not confess it, and yet come into a court of justice, and ask you to believe their story. Yes, the witness Wilson, who kept the ferry, not across the river Styx, but across the Niagara, and who man-

aged, not Charon's boats, but his own, could give free passage to the felon Lett, that he might burn and destroy the property of the peaceable inhabitants; that he might murder the lamented Usher; that he might destroy the monument of Sir Isaac Brock; that he might set fire to steamboats and destroy the lives of innocent persons. But alas! that celebrated captain-general in the army of the prosecution has been lost to them, and they have bitterly felt the sting of their mortification. These are the witnesses; these are the constituent parts of that gallant and virtuous combination of heroes, who come forward to take away the life of an innocent man, thinking to claim belief from an intelligent jury. I am, gentlemen of the jury, really at a loss to determine what I ought to do with respect to the duty which I owe to this cause and to you. Ordinarily I should feel called upon to enter minutely into the evidence which has been given to uphold the prosecution. But so much time has been consumed—so many draughts have been made upon your patience, that I hardly dare enter into the thankless office of commenting on the evidence of the witnesses *seriatim*. But not being able, gentlemen, to discover among you twelve, though some of you are well known to me, any window which opens a view to your hearts, and as long as there is a shadow of a possibility that you are not fully satisfied, I shall feel compelled to proceed, that no shadow of doubt may remain.

I will promise you as much brevity as I am able, in examining a few witnesses, until I come to those who connect McLeod with the transaction. I shall dispose of the whole at a glance, who were connected with the steamboat at the time of its destruction. It is enough, in thus glancing, to say that they came here with no intention to disclose fully and fairly the whole truth.

Take the first witness, Wells: Did he come here with an honest intention, and freely and frankly give you the honest truth, the whole truth, and nothing but the truth? Upon his direct examination, it appeared that his only purpose, in

fitting out his boat, was for the sake of private gain, giving a little scope to the enterprise which naturally distinguishes an Eastern man—an enterprise undertaken for his own individual emolument.

Such, gentlemen, was the plausible appearance of this witness' testimony on his direct examination. Was this true, or was it false? You saw with what reluctance he admitted one fact after another in his cross-examination. He started from Buffalo with this steamer, of which he was the owner, his crew consisting of a negro and a boy, and so exceedingly enamored was he of the movement of the machinery, that he stood gazing in silence; and it is surprising that he had not, while beholding with such intense interest the wonderful operations of the engine, been converted into a statue, or like Lot's wife, into a pillar of salt. Before he left the stand, a few facts leaked out, like raindrops after a long drought, and those facts were quite sufficient to overthrow the whole of his direct testimony. He stands utterly impeached and convicted of direct perjury.

When a man takes an oath, he swears that he will tell the truth; and when his direct examination closed, he had not told the hundredth part of the material truth. Because, first when he stated that his resolution was to carry passengers and freight, he intended to communicate the idea to the jury that ordinary freight and passengers were meant. But did he mean that? If he did, then the whole of his testimony is as false as the Koran; if he did not mean that, he was guilty of a prevarication which should discredit his whole testimony. Either way he is upon the horns of a dilemma. But it came out that he had carried upward of one hundred armed men—and it turns out, also, that before he brought his steamboat into the employment at all, he went to the Island, saw General Van Rensselaer, Colonel McKenzie, etc., and the result was the fitting out the boat for the service of the Navy Islanders; and he was, besides, referred to the executive committee, composed of thirteen, which is spoken of as having a commissary, secretary and chairman, in Buffalo; to these he

was referred to conclude the details of the arrangements. In the early part of the examination he knew nothing of a bond of indemnity; but it ultimately turned out that there was to be a bond signed by twenty of the executive committee, and it was at last actually signed by five of them. What was the intention of this bond? To indemnify Mr. Wells for the expense of cutting out and repairing his boat, and against all risks to which his employment in the service of the brigands would expose him. This was the bond which should have been furnished by this committee of safety, who had the honor of being commissioners between the Islanders and this contracting party. This is their first witness. Let him be taken as a specimen of the whole; and see if you cannot discover reasons and motives enough, on the part of those on board the boat for describing their dangers and perils with a little more coloring than the truth would warrant.

I will pass over a few of the succeeding witnesses, and will examine with a little minuteness, though it has already been done with much ability by my learned associate, the evidence of those witnesses who connect this affair with the killing of Durfee. And that there may be no confusion in the matter, we will take them up as they were called; and while considering this, we will show that every one of these witnesses knew perfectly well all the purposes of the enterprise. Let us examine and see how their testimony reads. All these witnesses have been acting in concert. One of these was the witness who put the anxious question to the other, "Will the evidence taken by commission overthrow that taken upon the stand?" The bartender of Smith says he "saw McLeod only once that evening, and that was at the place where the rails were burning. After the Caroline was on fire he saw two or three boats come into the cut, and having some friends in the boats, he ran down to the mill where the three boats landed."

Now mark, gentlemen, three boats came in—three landed; he had some acquaintances on board, you recollect, and he came within eight or ten feet, where he saw that McLeod was one of them. From there he went to Davis' tavern with the

party, and the witness then says, they were debating in front of the tavern whether they would go in and take something to drink. But all this time he had not broken silence; and then we have the singular fact of the soldiers' saying, "No, we'll not go in here, we have our bartender with us; we will go back and have something at Philo Smith's."

These three or four or five soldiers then separated from their party, and went home with the witness to take something to drink. But the witness does not stop here. Why not? I will give you the reason—first, because the darkness of the night would greatly weaken his statement, as there might have been a little doubt about identifying the prisoner. He goes on to say, that he saw McLeod the next morning about daylight, and speaks of his being wounded. Smith's tavern, he says, is on one side of the public square, and Davis' on the other, at six or eight rods distance. Witness looked out, he says, and saw McLeod across the square, and recognized him. But when he went over to speak to him he was gone, and could nowhere be found, although the witness sought him carefully (perhaps not with tears)—he did not afterward find him, or see him at all that morning. This Samuel Drown is the same man who, when he was summoned last winter to go to Lockport to give evidence, said he knew nothing which could beneficially affect either McLeod or the people, and for that reason refused to go. And now what is his evidence produced for—to satisfy your minds that McLeod was at Chippewa—that he was in the boats which formed the expedition.

This is the same Drown who now tells you that he saw McLeod first by the light of the beacon; that he came within eight or ten feet of him at the boat; and in the darkness of midnight, and in the shade of those willow trees, his vision was such, that he asks you now to say upon oath that McLeod was the man he saw there, and that therefore you should hang him. He asks you to believe that he looked out in the gray of the morning and saw McLeod; and he wants you to believe, also, that he was not at Stamford, and not being there, that you should hang him, on the oath of this same Samuel

Drown. Is this the testimony upon which to find a man guilty of a capital offense?

It is enough, if true, I will admit, and the Attorney-General might have abandoned all other proof. But, gentlemen, we maintain that this Samuel Drown cannot command your belief. It is a singular fact, but so, by the eternal laws of our creation, will the fact always remain, that when a witness comes forward and commits a wilful perjury, he never covers the whole ground—never. He will always have some awkward feature in it, which might, by perjury, as well be supplied as not. A man committing perjury has unlimited means at his command—he will avail himself of some known and admitted circumstance which he can speak of and which will prove to be true, and with this he will connect the falsehood. Now what is the reason of this? I will furnish you with the best reason I am able, after several years' experience in the trial of causes. I say it with humiliation, but we never witness the sitting of a court for the trial of causes, where we do not witness deliberate perjury. You need not be surprised then, gentlemen, that there should be perjury upon this trial. The reason is this: as to the omission to fill up the given niche, it affords an opportunity to the learned counsel to say, why, would it not have been just as easy to fill up that niche? He has therefore furnished you an argument that he has not been guilty of perjury. This, gentlemen, is one of the subterfuges to which felons resort, in order to lay hold on public confidence and command belief. If he speaks as to one important fact which is corroborated by others, so much of his story is true, and having told the truth with regard to one circumstance, he argues that it is reasonable to presume that the rest of the story is true also. These are the ordinary supports which a perjured witness will always call to his aid, in order to command belief. How is it with regard to the testimony of Samuel Drown? It is perfectly true there were boats which passed through the cut and went up the Niagara River, and it is also true that a part of the expedition came up to Davis' tavern

afterward. Though there is a discrepancy as to the number of boats, and it would also have been as easy for him to state that he saw McLeod at Davis' the next morning, as to say that he saw him across the public square, leaving something to be supplied by other witnesses. I pronounce the whole of this testimony to be, in my deliberate judgment, a sheer fabrication.

Now, with respect to Corson. He begins by saying that he saw McLeod at Macklem's at 4 o'clock in the afternoon. Well, we have no evidence to show that this may not be true, but see how he alludes to this circumstance to give plausibility to his story, and obtain for it credence. He has failed to mention a single human being who was with him at Macklem's store to witness the interview of which he speaks. Why does he bring in the names of Drew, Mosier and Usher? He speaks of the unfortunate Usher who, a year afterward was murdered at midnight, at his own door, as you have all heard—a man who was understood to be on the party engaged in taking the Caroline, and who, for that reason, paid the forfeit of his life to the midnight assassin, when he rose from his bed to answer the call of a voice which he knew to be that of his neighbor. This Usher was vouched as one who was present upon the expedition. Mosier was vouched as another, and Drew as another, in this man's testimony; and why? Because he saw these persons in Macklem's store in conversation with McLeod. Now what would we have you believe from this unsupported testimony? Why, he would wish to fasten upon your hearts and understandings the conviction that McLeod was a partaker in that enterprise, because he swears that he saw him engaged in confidential conversation with those men, who confessedly formed a part in it. Is not this his expectation? Surely it is. And yet you will have to form his conclusion against the united testimony of McNab, who commanded the performance of the act; of Drew, who executed it, in obedience to that command; and of Harris, who acted under the directions of captain Drew. And you must recollect the parties were in a public store

contemplating a project which required secrecy to insure its success. And you are called on to believe that men so engaged would publish on the house-tops the subject of their consultation. Gentlemen, I give you my full assent to believe, if you are able, the statements of Isaac P. Corson. Then he says, he saw McLeod again on the 29th of December, in the evening. Well, I inquired what pretense he had to know. He said he met him at the door. The man he met coming from the light, he going toward it. Well, it would have been easy to say that he went over to Davis' and saw him there, and spoke to him; this would have been just as easy, but it would have been more suspicious. To say he met him at the door, seems exceedingly honest, it is this plan which every man guilty of perjury would adopt to give credibility to his story. He stated also, that he saw him again the next morning, amid a crowd of persons, and heard him say he had killed one or two damned Yankees. He could see at this time only McLeod, although there were a number of persons present, and he could hear only what was said by McLeod, and no one else. Now, this looks very like fitting the evidence to the case. It was important to find a witness who would swear to a good deal of materiality. Unfortunately he cannot speak as to what any one said but McLeod, of whom, he could see only the head and shoulders projecting above the crowd.

Now, gentlemen, there is another matter which is worthy of some note, this same Isaac P. Corson testified at a later period of his cross-examination that he had heard of the arrest of McLeod, and of his examination before Squire Bell, in October or December, 1840, and it so happened that it was November; and he knew also that McLeod was brought before Judge Bowen by *habeas corpus* for examination, with a view to his release, and during all this time this witness never opened his lips with respect to what he knew. The examination lasted several days in succession; it was during that examination that Defield made his attempt to impeach the testimony of the Morrisons. "I knew the whole transaction, but I kept it to myself," says the

witness. And why? "Oh! because I am not in the habit of speaking of such things," such is the testimony of this infamous — I beg pardon, gentlemen, I will not allow myself to make use of that expression, however just and applicable it may be; it escaped me unguardedly. He says that McLeod had confessed that he was one of those who had set on foot and assisted in the enterprise.

I ask you, gentlemen, if you can give any credence to Corson, who can give such a relation as this? This shows the importance of cross-examination, though it may seem to be rigid and unkind, it shows that these are witnesses who call for no very great exercise of charity or kindness toward them. These overwhelming and contradictory facts were drawn out on the cross-examination.

But this is not all, there is another circumstance of impeachment of the witness, wherein he stands impeached, in the very witness' stand in our presence. I was desirous of knowing whether he would venture to name any other person who was present, and who saw what he saw; and after a good deal of scrutiny—a good deal of pressing (for he had to be brought to the scratch several times, he was so skillful in dodging, like the race horse hard to be brought to the starting post, but when once engaged in the race pursuing it with pleasure), upon being at last brought to the mark. He says, "It occurs to me at this moment, for the first time, that Mr. Caswell was there."

I do not know whether any of you regarded this witness as I did, and if you did not it was no dereliction of duty, though I hope some of you did notice it, but my own conviction was that every word he uttered was rank perjury. You will have noticed how suddenly it flashed across his mind for the first time that Caswell was there, while it appears from his subsequent acknowledgment that he has since conversed with Caswell as to the particular day when these occurrences took place and yet he told you on that stand, that then for the first time it occurred to him that Caswell was there.

Gentlemen, I will apply to this witness, the old adage *Falsus in uno falsus in omnibus*, which means, that falsehood in one particular throws discredit upon the whole. If he is unworthy of confidence in one particular he is in all—a liar is not to be believed even when he speaks the truth. This witness—and the remark applies to many—was at a loss to tell how the People found out that he knew anything about the case, but this is a point of no great consequence. I will now dismiss this same Isaac P. Corson as one of the colleagues of Caswell and the two Smiths, who could not do better than adopt for their motto “united we stand, divided we fall,” but whether we consider their testimony together or separately, I believe it will not be considered worthy of belief.

Let us next come to Charles Parke, he was bartender for Davis, and consequently had good opportunities of knowing whether McLeod was there; and yet he was exceedingly cautious. He saw McLeod in the afternoon, cannot tell the hour, and saw him again in the evening. You have the statement of McLeod himself that he went to bed about three o'clock, and Davis also states that he went to bed about three o'clock. But this witness makes the time of his getting up a little later than the others do, so as to make it difficult for him to get to Stamford. At this point Mr. Press takes him to Stamford. Three-quarters of an hour afterwards this man saw him at the cut at Chippewa. Now either Press has uttered a deliberate falsehood, or this same Charles Parke is perjured; about this there is no mistake.

He says he thinks McLeod got into one of the boats and proceeded up the river three-quarters of a mile; nearly opposite Navy Island—witness remained there an hour or two upon the bank of the river and then returned and went to bed. Well, do you suppose, whether he was there or not, that he was ignorant of what was done—of the fact that the boats after they left the Chippewa were towed up the river? He knew precisely what the testimony of fourteen or fifteen other witnesses was, upon this point, and he made his testi-

mony to square with theirs. Now, the next morning he saw McLeod and saw him also through every part of the day. Well, this was not necessary, because our own witness brought him back the next day. His next statement is that at sunrise or a little later he again saw McLeod in the public square at Chippewa with a sword by his side, he could not say that any one was with him, nor did he hear him say anything. Now is it very likely that he should have seen McLeod alone with a sword by his side at that early hour in the morning? If you believe this story you will have to disbelieve our whole case; if you doubt it a little the witness cannot complain, after you have heard a little more which will appear in the sequel.

He says he afterwards heard McLeod boast of having taken part in the expedition. I, gentlemen of the jury, standing in my place as counsel for McLeod, authorized by him, take upon myself to say that he never made any such boast. When these statements have appeared from time to time in the public prints, McLeod has said, "Can it be possible that they should suppose I am so very a fool as to boast of having had a part in this matter, when every person living along the frontier knows I had nothing to do with it?" If he had boasted of it on this side of the line would the evidence not have been brought forward here on the part of the prosecution? But if he boasted of it on the Canada side of the Niagara River he would have been guilty of the most arrogant folly! I have had to interpose my authority to prevent McLeod from contradicting through the public prints, these absurd statements. I represented to him that it would be much better to allow the trial to exculpate him from the folly which had been imputed to him of boasting of an achievement in which he had no share, and at a place, too, where it was perfectly well known that he had nothing to do with it.

There is another circumstance regarding this witness Charles Parke, to which I would desire to direct your attention. You will recollect that he lives seventeen miles up the

Chippewa, and he wished to give you to understand that he came here reluctantly; that emissaries were stationed to watch his entrance within the limits and jurisdiction of the State of New York; and when, at last, he was surprised and caught at Buffalo, and subpœnaed to come here, he went to Mr. Hawley to ascertain whether he would be compelled to go, and was told, that unless he consented to go, measures would be taken to compel him.

Now it strikes me, gentlemen, that there was no want of understanding on the part of this witness. He knew perfectly well, that however potent the arm of the law is within the jurisdiction of our courts, that it could not have reached him, if he had gone home. I do not believe a word that Parke has said. He was a bartender; and he represents himself as being so busy that he did not even know where McNab's quarters were; and it is a little singular that he got away up the Niagara river three-quarters of a mile, to see the expedition embark! Then, with respect to his unwillingness to come here, he says he was on his way to Buffalo, and a person asked him if he was going to Buffalo; he replied that he was, and then, like a scape-goat, got into his wagon and drove home; and for no reason but because a man asked him if he was going to Buffalo.

Now if he was really going to Buffalo on business, and believed that this man was a spy, who would give intelligence to somebody that he was going there, would it not have been easy for him to put the man off his guard by what Mrs. Opie would have called a white lie? But he was so very scrupulous in truth-telling, that he said he was going, and then fled away! I will give you my interpretation of his conduct. He started to go to Buffalo, to be subpœnaed to attend this trial; and when he got to Chippewa, he ascertained that he was one week too soon. He went home and waited a week, and then what happened? We find him next coming, with a two-horse wagon, into Chippewa; and, as he says, he was inquired of again if he was going to Buffalo, and there was a man standing by who turned away his face as though he did

not notice him; and this man crossed below the falls, and got to Buffalo before him, and was ready with a subpoena for him when he arrived. He had his team there, and what did he do? Did he buy his plough, and pump, and stove? No such thing; but sent his team home without them. Now, gentlemen, if this be a story which commands your belief, I confess I am greatly mistaken. In my opinion, the whole of this statement is set up to give force and consequence to his evidence; to give you an idea that he came here by constraint of the law, that this circumstance might furnish to you evidence that he had no motive in falsifying the truth. If it be not so, then I confess I have been wholly unable to see its purpose. He knew full well that he would have plenty of time to come here before his evidence would be required; and I submit to you, wheher, if his statement be true that he came reluctantly, he would not have purchased his plough and the other articles which he professed to have gone to Buffalo to buy, and sent them back with his teamster? But if I know anything about it, he brought a person with him expressly for the purpose of taking the team back, knowing that he would be subpoenaed.

This man also endeavors to fortify his statements with other circumstances. He says he was invited to leave the tavern and go up the river with Captain Nellis. This same Captain Nellis was a stranger in Chippewa; but he had procured the countersign, which was the word "Place," and gave it to the first sentinel; and thus they could wander about, never having the countersign demanded after the first time. This part of the story may be true; but as I do not believe any part of it, you will pardon my skepticism in doubting this also. He says he went up merely from motives of curiosity, as the house was more empty then than common. He says he looked McLeod in the face, but did not speak to him. It became important that this same Charles Parke should testify that he saw him at a distance of eight or ten feet in midnight darkness, and that he looked him in the face. This is the same man who, several years ago, went

with his brother-in-law, some twenty-eight or thirty miles, to settle sheriff's fees; and this is his apology for knowing McLeod! This ends the patchwork. He was afraid of going to be a witness, and would flee from any one who was likely to subpoena him, as from the "wrath to come."

Meyers lived in Canada, and says that eight or ten days after the burning of the Caroline he saw McLeod. This is the man who wandered about the country from the round plains near Lake Simcoe; and the forty years' wandering of the children of Israel in the wilderness was never drawn upon a map more devious and crooked than was the route which he pursued; and it is a wonder that he was not as long in getting to the land of promise, as were Moses and his followers. I wish you could look upon a map; to pass by Smithville from the round plains, he must have gone forty or fifty miles out of his way. Did he go through St. David's? No; he went west of St. David's. Did he go to Chippewa? No; for he saw no soldiers. Where did you strike the Niagara river? I don't know; it was two or three miles from the falls. The sequel shows that he was brought through this devious way to have an interview with Alexander McLeod. Now let us have it. "Somebody said, Where is the man that shot Durfee. McLeod cried out, 'Here he is; I am the man,'—and drew out a pistol and said, 'that is the pistol that shot him.' He then drew his sword, and said, 'there is the blood of a d——d Yankee.' There was blood dried upon the sword, for five or six inches from the point." Now if this is a story which you are ready to credit, that, eight or ten days after the burning of the Caroline, McLeod was at the Pavilion, or any other tavern near the Falls—if you believe that McLeod was there, with a pistol in his pocket, and a sword by his side with six inches of blood upon it,—then you will be able to believe the story of Meyers, who wandered forty years before he found Alexander McLeod. But I think, before you give credence to the story of the wandering Meyers, you will set him down with those who have preceded him, and who have fabricated

their stories from beginning to end, and told the most foolish lies to get into the presence of McLeod.

Calvin Wilson is the man who kept the ferry at Niagara. He would not acknowledge that he harbored Benjamin Lett; but he is the same man who gave \$200 to promote the patriot cause, and the man who belongs to a secret society, and who was afraid of a criminal prosecution, if he swore to the truth—the same man who swears to the confession of McLeod. Now look, and see if his confession does not follow up in the chain with those who testified before. When some one inquired how many were killed at Schlosser: “He did not know; but one thing he did know, that one d——d Yankee, or rebel, had got shot upon the wharf.” Well, gentlemen, our commissions prove that there was, in point of fact, a man shot upon the dock, and that he fell dead; and it is well known that Durfee was found thus shot: and this confession, which was put by this witness into the mouth of McLeod, was framed just to suit the case.

I intended to treat this Wilson fairly. I asked him how the conversation was introduced. He says he went over the river to see Mr. Meredith, the successor of Mr. Raincock, and that he saw Raincock in the barroom; that Raincock made the inquiry, and McLeod answered him. I put the question to him—“Are you not mistaken about its being Mr. Raincock?” His reply was, that he was sure. I did not stop here, but put the question whether Raincock did not leave before that. He answered, “I know he was there.” Now it is possible that he is mistaken as to the man who held the conversation; but it so happens that a stranger to him and myself told me that he left before. We have called Mr. Hamilton, and four or five other witnesses, who testify that he had left before that time. It proves this: that he is mistaken, or that he is guilty of falsehood. Why did he vouch any person? It was to add strength to his testimony. Why did he name Raincock? I will answer that also. He named him because he thought that would add strength; he named him because he was out of the country, and could not be

brought to confront him. These are two cases where the witness has involved himself in difficulty, as other liars always do. He named a man who had actually been there, but now could not be brought forward. Therefore it was that he vouched him, and no one else; and, through a failure of memory to sustain him, he has involved himself in a contradiction which renders his story utterly impossible.

Here allow me to remark again, in general, that it is one of the beautiful laws of Him who created the moral as well as the natural world, that truth will always be consistent with itself. It needs not the exertion of great memory or genius to be able to get along anywhere, whether the period be distant or otherwise, while truth is on your side. Whenever you undertake to bring falsehood to serve as the substitute of truth, the same law always involves the liar in difficulty. It is the contrivance of villainy which leads to the detection of villainy. A villain never breaks your dwelling, or robs you of your treasure, but he is driven to resort to those means of concealment which, sooner or later, lead to his discovery. So the means which this witness has used, have given to us the power to overthrow his testimony, unless the Attorney-General would have you still believe him, and hang McLeod upon his oath, though every word he has said is false.

Will the Attorney-General press the prosecution thus far? I trust not: I will wait and see, before I judge him thus harshly.

This disposes of Calvin Wilson. Now a single word as to Seth Hinman. He says he saw McLeod the next morning after the destruction of the *Caroline*. Now, gentlemen, you will find this story in exact conformity to our statement of the case. We say he was at Davis' after dark, and left there soon after: this witness must tell you that he was a bartender for Patrick Cavanaugh, one hundred rods off from Davis.' While the village was filled with troops—for there were 2,500 men at Chippewa—this man could get up between daylight and sunrise and see McLeod; and swear that he was

there in the morning. This man swears that he had been examined before Esquire Bell at the examination of McLeod, and that he did not say anything about seeing him in the morning; he did not think of it then. He first mentioned it last spring. Now, gentlemen, this man—this Seth Hinman—is a brother-in-law of Corson, and a colleague of the Smiths. This is the man who had been called, one year ago, and then only testified to the interview in the evening; but now, having heard our depositions, and knowing our whole case, and finding this an important point, he conjures up this story, that he came down in pursuit of news at daylight, and that he then saw McLeod. Oh! the depth of the wickedness of man! to fabricate a story to swear a human being to the gallows. May God grant him deliverance, for no other power is equal to it.

I have yet to examine the testimony of several other witnesses, because there are emphatically a great cloud of witnesses; and if in this case, as in others it is said, by the mouth of two or three witnesses shall all things be established, how much greater is the danger of my client, when such a host of witnesses are marshalled against him? Before proceeding further in this examination, which I admonished you would not be interesting, but dry and desultory, I will add, that, though I may seem harsh and severe in my strictures upon this evidence, I will “nothing extenuate, nor set down aught in malice,” but truthfully, faithfully—and I hope fearlessly, present by views of the evidence connecting McLeod with the destruction of the Caroline, so that it will appear, as by the light of the brightness of the sun’s rays, in its true character—the whole of it, as I verily believe it is from beginning to end, an unholy and wicked combination of wicked men, to promote the most base and wicked purposes.

Sarles Yates will not, need not, receive much attention at my hand. I notice him simply to remark, that the least trifle on earth has been hunted up with the hope of making it available in this case. The whole of his evidence amounts

to nothing at all. He says, that somebody said, "This is something like the night of the burning of the *Caroline*.." Another answered, "Yes—we gave them '*Aleck*'—I should like another job like that." His evidence, it was hoped, would connect McLeod with the affair, but that failed; and when he had got through, I was about to call upon him, when the Court interposed, and almost censured me for not objecting to it at the time. I have no doubt the prosecution hoped, by means of his evidence, to connect McLeod with this affair, and I have only to call your attention, and say how signally it has failed. This witness shrunk from the service which he had pledged himself to perform.

The next is William Caswell; and here, you will bear in mind, I bring in one of the group in respect to whom I have commented already. He is one and indivisible with Corson, the two Smiths, and Hinman. They all stand in the same category, or little knot, with combined hands; they have looked into the depositions, and have calculated to command belief from the greatness of their numbers. It needs no greater strength of ingenuity or depravity—the wickedness is the same—the depravity of which it furnishes the evidence is the same—and this is a matter which involves interests sufficiently diversified to find more than one, or five, or twenty-five, or five hundred, as depraved as Caswell and the Smiths. It is my solemn conviction, that this most dangerous combination along the frontiers of our country can furnish any number of men for any purpose, whether to hang McLeod, or to involve the country in war. I have no confidence in them—I repeat it, I have no confidence in one single soul of them. I believe they are all steeped in desperation. My acquaintance along the frontier counties has satisfied me that they are a body of men, who, if consequence enough can be attached to them, will involve our country in a war; but if Great Britain and the United States will view this subject in its true light, they will find no cause for war, merely because such schemers shall undertake the work of pressing them into conflict. There are some within my hear-

ing—within my look too—and I say to them, as I say to every other one along the frontier, that this effort to get up a war shall never meet with success, if their character and motives can be well appreciated by the community, to whom they owe a solemn duty, but disregard it.

This Caswell says, that he saw McLeod at 9 or 10 o'clock, more or less—he concluded that he was talking to a scrivener, who was making out a deed, and who says, seventy-five acres, more or less—going from Davis' to Mecklem's. He began, as did Corson, and as did the other two witnesses, and Parke, with taking latitude enough to meet any and every emergency. He says he saw him again the next morning on Davis' steps. If McLeod was there at 9 o'clock, and remained till 10, it would not be very strange if he were one of the party who entered a boat at that hour, and put off for the American shore; and if he were there at 7 on the next morning, never having been away through the night, it would not be strange that he should have been one of the party. Caswell swears to this with great positiveness: it is true or false, and he knows which, just as well as any human being can: and it becomes the duty of you and me, to put what construction we consider right, as to whether it be true or false.

He says there was quite a number of persons about there at the time when he came into the barroom, and heard McLeod talking and heard him say that they made the d——d rebels run when they came there; that he had seen one dead on the dock, and adds I think he had a large pistol in his hand by the muzzle. This witness spoke with Corson and asked if the depositions would come up against the witnesses on the stand; two or three of the party, who had been over, were talking together; one had seen a man dead on the dock; and, if Corson was not mistaken, McLeod held a pistol in his hand.

I submit to you, gentlemen, whether you are not satisfied that this man who says he went on to the steps just as McLeod went off, that he came half a mile before daylight, that

he did not speak to McLeod, that he had no arms, but "knew he was engaged in the Caroline affair," may not very well be set down with the rest. What do you think of this expression: "If I am not mistaken, I think he had a large pistol in his hand by the muzzle?"

If the fact took place and he saw it upon the morning of the 30th December, there was no need of his expressing doubt as to being mistaken; if he saw him handle the pistol by the muzzle there was no need of thinking or doubting; but even here, this man is not the first instance where men have failed in having courage—I will not say moral courage, he failed in nerve—and dare not come up to the labor of positively asserting that this man then held a pistol by the muzzle, and that it was the instrument of death which was used against Durfee; why not? Because he is like every other coward and knave and villain, that stalks abroad in our land; when did you ever know a man of nerve who was steeped in iniquity? It is honesty, generosity, nobleness of soul, which enable a man to declare boldly and fearlessly what he knows. But no such thing ever pervaded the bosom of this Caswell; if so, it has been long since extinct, and if not, he only needed to be swayed by those who appeared before him to extinguish every particle which ever mingled in his composition.

Thus much for this man; which brings me to the evidence of Anson D. Quinby. The testimony of this man has been thoroughly examined by my associate, I shall not have occasion to say much respecting it; but I owe it to the Attorney-General to say that he is not responsible for the character of this witness. I presume he has received many letters from persons with whom he would not be the first to open a correspondence. The man Grosvenor, who first wrote to the counsel for the prosecution on the subject of Quinby's testimony, is a fit associate of Quinby, as I verily believe, for he stands under an indictment in Pennsylvania on a criminal charge. He was a fit tool to inform the Attorney-General that Quinby would be an important witness, but did he take

the precaution not to be himself deceived? I believe he has been again and again deceived. It would seem so from the account which Quinby gives and Mr. Lott, the magistrate, who would not put the statement in the form of a deposition, which was required; but the magistrate, Grosvenor, took the deposition and certified to his character and found out inducement sufficiently strong to bring this Quinby here to depose. He did come; we have seen him—we have heard him—and we have heard his character from his neighbors, and it is now submitted whether he is deserving of your confidence.

The witness says, I saw McLeod again at sunrise, not far from the end of the bridge. This is an entirely new location; he was not a very apt scholar, or he has not observed his teaching with the same attention or fidelity as some others. He says there was no one with him, and he is not sure that McLeod had a belt around him or anything hanging at his side. He says that some one came across the bridge and asked him how they made it go. He said, "I or we, killed two d——d Yankees." He held up a sword and said, there was Yankee blood upon it. If he had seen it and knew it to be Yankee blood, it would have been almost proof conclusive that it was the blood of Durfee; as he was the only Yankee slain on the occasion. He says he saw McLeod at Davis.' But you cannot find a man to agree with him in this statement, because he says it was at 8 o'clock, and it is stated by others to have been at 7; but as to the time, it is quite immaterial.

It became necessary that this Quinby should come all the way from Pennsylvania, and have his expenses paid from where he lives to Buffalo, then have \$10 given him to get to Utica, and a promise of pay for his return, and for his time also. This, gentlemen, is the man we find, where the point pressed the hardest, ready to supply all deficiencies. He probably was at Chippewa on the night of the 29th. And if he was there on the 29th, with a load of hay, he might have seen McLeod, and it would not have weakened the force

and strength of our defense, in the smallest degree; but since he came here, he has found, that it was much more important to have seen him in the morning. Think you that he had not learned that those witnesses, upon whom I have commented before, were ready to swear that they saw him in the morning, and that he himself has not taken courage to swear that he also saw him in the morning.

We will now see what reasons he assigns. He says he saw McLeod in the morning at a very early hour, between daylight and sunrise, not far from the end of the bridge. He says that he came in with a load of hay in the afternoon, with a team which was owned by his neighbor, for it seems he was not himself the owner of a farm, or a team. He did not know where the hay was weighed; he did not get pay for his hay. The man who brought it went home, to Sodom, a distance of about five miles; a fitter place for this man could hardly be selected on the face of the earth. The man went away and left him, and he saw McLeod there about nine o'clock in the evening. According to his story, he undertook to walk home about two miles, which he could do in thirty minutes. Well, he started; but, did he get home? No, he stopped at Mr. Pettis', about half way to Sodom. He never had stayed at the house of Mr. Pettis before. Was he invited to stay that night? Not at all; why did he stop there, and stay instead of going home to his family? Why, it occurred to him that he had a settlement to make with the commissary, and he wished to return early in the morning, and thought he would stay at Mr. Pettis' over night, as he would be just so far on his way next day. That is the reason. He therefore left Pettis', and having only fifteen minutes' walk instead of thirty, he got to Chippewa about sunrise. Well, did he do any business at the office of the commissary? He did not; but he passed by Davis', and there he chanced to see McLeod at the end of the bridge. He went on to the office, thinking that he might find the clerk in. He stayed there without his breakfast, and finally got home about noon, without seeing the commissary general or

his clerk; without his money, and without his breakfast. He could not but have known that these offices are not open until 9 o'clock, but he found it necessary to furnish some excuse for being back in Chippewa in the morning.

If you can believe this long story of Quinby's—if it does not carry its utter overthrow upon the very face of it—we may be obliged to show you something of his character. Lott and Wetmore, both of Pennsylvania, say they would not believe him on oath. That is his reputation where he is best known. It is a remark of the neighborhood—"If you want a man to swear up to the mark, call on Quinby." He came here and has sworn up to the mark, as perfectly as in Warren county, Pennsylvania.

If you are satisfied, and can put reliance in him, as he has come so fully up to the mark, you will give to his testimony all the consideration it deserves.

We will now pass to Justus F. T. Stevens. I did not ask this witness a word, for I saw the pain and distress that my adversaries endured while he was upon the stand. He had not got his lesson. He is contradicted by every other witness whom they have brought before you. After he had told his story, he was permitted to retire. I do not recollect whether it was after you had retired, but I saw the same Justus F. T. Stevens coming forward to the stand, where he received a certificate of attendance here, to entitle him to a reward for his services—the stipulated price to be paid for perjury. This is the man who spoke of seeing three boats put off directly from the cut across the river, and come back to the same place.

This brings me to another, who was considered by the prosecution an important witness. I thought he was entitled to be placed alongside of Parke. It was fun-and-frolic Leonard Anson. He was among the latest witnesses. I have no doubt the Attorney-General has been deceived. When they made their former statements, they perhaps were not cross-examined. I will not believe that those who had the management of this prosecution ever had any just concep-

tion of the character of their testimony. One thing I have regretted; that among the number of the prosecuting counsel—composed of gentlemen whose reputation stands high for professional ability—gentlemen holding high and responsible judicial offices under the government—that not one among them, when this testimony was concluded, had risen and said: This testimony will not justify a conviction. There is so much doubt thrown over this case that we cannot ask a verdict of guilty.

If this had been done, it would have been an antidote for many evidences of asperity. For the evidence which has been given has not been confined under a bushel; it has been given in open day: it has already gone forth to the world; it will be read by our reading community—by the European reading community; and throughout Christendom. The public will read and judge it; and it may safely be said, they would justify the prosecuting counsel in rising in their places and disclaiming a verdict of guilty.

I spoke of this Leonard Anson. I am willing to leave to the learned gentlemen the conduct of their case; but, at the same time, I claim the right to judge of the manner in which it is conducted; and having formed a deliberate judgment, I claim the right to express it; and I have thus frankly expressed it before you.

This Leonard Anson was in bed at Philo Smith's. There was a sentinel at the door; he got up and looked out, and saw the Caroline burning. He went to Davis' tavern; where he heard McLeod say that he had killed one d——d Yankee, holding out a pistol which had blood upon it. He afterwards heard of McLeod's arrest before Squire Bell, and he went forward as a witness on that occasion. I have taken the pith and marrow of this testimony, and you will judge whether there is any fun in it at all. In the first place, he stated that it was just at the dawn of day—when light scarcely was streaming from the horizon—it was not sunrise—it was not broad daylight, when he went from Smith's over to Davis.' Again, he states that the lights were all blown out. Do not

forget that, for he says so. We bring him to Davis' tavern, then, just as the day peeped; here is a room full of men discussing the question as to who had committed the greatest crime—McLeod declared that he had killed one d——d Yankee. Witness saw the pistol, six inches besmeared with blood. He resided at Niagara Falls.

Here you have the story of this itinerant witness. I have read his testimony pretty fully; and I want you to bear in mind, that he went over just at the break of day; that he saw the bloody pistol in the darkness of the room, when everybody knows that these horseman's pistols are very nearly the color of blood. Another singular circumstance is, that this man should have lived at Smith's, bedded and boarded with him, come to Lockport with him, and been constantly with him, and never mentioned, until after McLeod was arrested, what he knew; but when Smith went to testify, and having been unable to make himself believed, sent off twenty-one or two miles, in the night time, for this witness—he was then ready to swear to this story, which it had never been convenient for him to tell before that day. If you are inclined to believe him, I have nothing to say.

John C. Davis, I will have occasion to allude to again, when I come to our part of the case.

Philo Smith supported Drown; now, Drown will support Smith, and Corson will support Caswell, and Caswell the Smiths; you may thus go round the whole circle; and I wonder that had not been resorted to, for they are ready to swear for one another.

I will now comment for a single moment upon the evidence of James M. Dyke. He would not own that he was a stage-driver, but he had been entrusted to receive the pay. I wonder whether he has not been employed to lie, too. He was called to disparage the examination of McLeod before Judge Bowen or Bell. McLeod had stated before Bell or Bowen, that on his return from Stamford, he met one James M. Dyke. McLeod vouched him, to prove that he was not at Chippewa. They then called James M. Dyke to swear he

did not see McLeod at that time, and he did swear so, most stoutly; he must have a pretense for his inconsistency, and he says McLeod was mistaken altogether; that he met him at Stamford on the morning that the patriots deserted the Island; and that a boat was sent from the Canada shore to take off a single individual; he says that was the morning that he met McLeod. Well, how did he see him? McLeod had stated that he met Dyke a little way from the Pavilion. On the morning of the 30th December, Dyke swore that he saw McLeod hitching a horse; but he intended it as a contradiction. I have no doubt the circumstance he mentioned was false; it was one of those wicked devices which have been practiced to get up a pretense to sustain them in iniquity. What further did he swear to when he came into our hands? He would swear that he did not see McLeod, but did leave the Pavilion to go to Niagara on the 30th December. If Dyke did go from the Pavilion to Niagara on the hour mentioned, McLeod may have seen him and Dyke not have seen or noticed McLeod. But he had told that he did meet McLeod, and never discovered his error until quite recently. It came as suddenly as it did across the mind of another witness that Caswell was present—as suddenly as electricity itself. He had declared that he met McLeod on the way; and this James M. Dyke was called to overthrow the deliberate declaration of McLeod when he was examined before the magistrate; for there they could summon James M. Dyke, Mr. Morrison, and his whole family, Press, and a cloud of witnesses to give the lie direct before Judge Bell. And so before Judge Bowen on the *habeas corpus*. I have done with Dyke, and it brings me almost through this painful business.

We come now to the testimony of Timothy Wheaton. When the prosecution rested, I advised the Attorney-General that we should insist upon the rule of law, that no further confirmatory evidence would be admitted. I did not then disclose the reason; but I now do, thus disclose it: I knew there were hordes of witnesses here who would, if it became necessary, come forward; that it would be in his power to

add any number of witnesses to those already called. I intended, therefore, that he should exhaust his privilege, and no further door should be thrown open into which the step of perjury could enter.

But the Attorney-General seemed to differ from us, he declared afterwards in the presence of the Court, and I have no doubt he did it sincerely, that he embraced also the absent witnesses whom he had left, and upon his word as a gentleman the Court allowed him to come in and examine those witnesses. I at the time made no complaint against it, and I make none now, I make him welcome to every pound, ounce, scruple and grain of evidence which he derived from those witnesses; he needs it all, I would not detract one particle. With every support which can be gathered on all sides his case can hardly stand alone, and I will not therefore desire to take anything from him.

Now this same Timothy Wheaton was not at Chippewa, he lived at Whitby some thirty-five miles from Toronto. He says in October, one year after the affair, that he was at Niagara ferry; that he then lived at Whitby, and was never at Niagara before; that he had started to go to Lockport; and when asked why he did not go, he said because he would have to get a pass, so he turned about and went back to Whitby again. You see again, how foolish a man can be as well as how wicked. Did you ever hear a more foolish thing than the story related by this same witness; first that he should have left Whitby and traveled to Niagara, with a view of going to Lockport, and not cross the river because he would have to get a pass; but turned back and went to Whitby again. No cause for his coming, no cause for his returning, except that he had heard a conversation from McLeod, so that he could come into court and swear.

Again, I submit to you, gentlemen of the jury, whether you will believe, if McLeod has one drop of European blood coursing in his veins, he would have opened a conversation of this kind with this witness. It outstrips the veriest Yankee. I never knew a man from the utmost confines of Rhode

Island or Connecticut, with all his eagerness in boasting of the excellencies of his wife, and the success which had attended his peddling enterprises, who suffered himself to be guilty of so very foolish a volunteer statement, never; and do you believe all this? that a man like McLeod, coming from a land where they are famed for their silence, would have been guilty of such an indiscretion? Though last this witness may be regarded as not least in the stock of evidence. Welcome; I bid the prosecution thrice welcome; and this brings me towards a close—it only remains for me to allude to the evidence of William Defield.

What was he called for? To impeach the veracity of Captain Morrison, and for no other purpose. Who is this man? It is enough to know that he was a British soldier in Canada, while the patriots were on Navy Island, and that from the service of his country, where he had taken the oath of allegiance, he deserted in the night time, and came to Navy Island; who did he find there? William Lyon Mackenzie; who would not trust him at all; but put him in jail and kept him until the Island was evacuated; for fear he would spy out “the nakedness of the land,” and return. William Lyon Mackenzie never did a wiser act—I have no cause to complain of his conduct; if he had kept him there to the present hour, he would have been just as useful on this trial as he has been.

This same William Defield said that the only conversation he had with Morrison was when Morrison gave his evidence at Niagara in which Morrison said he could not swear positively that McLeod was at his house on the night of the 29th December, that he had been there a great many times; he says that was the only conversation he ever had on the affair; and now when he swore here, he stated that he had heard Morrison at his own house, with his family, express a strong desire that the American government would get hold of McLeod and punish him for the part he had taken in the destruction of the Caroline.

This is the evidence of the redoubtable Defield—this de-

serter—this prisoner upon Navy Island—I think I may now say this liar, prowling about; he was here today, and there tomorrow. I can scarcely speak with composure of these miscreants, when brought up to swear in contradiction to that which has been testified by persons of respectability, and with a view to consign to the gallows an innocent man; I have much difficulty in preserving my composure. What think you of a prosecution for murder which must be sustained upon such evidence? I have now gone through with this branch of my duty, I shall not name another witness individually, who has been called, but speak of them in general. From Samuel Drown down to Defield—take them all; put them together; melt them down in a crucible, and see how much virtue, dignity and honesty of mind, can be found in the entire mass.

I am aware I have dealt somewhat plainly with this body of men, and the treatment which they have received at my hands, as examining counsel, may savor of harshness and unkindness. They are to me strangers; I judge of them by their conduct and story; and believing, as I do, that every material word is a fabrication, you will pardon me when I say, that I have no sort of respect for them whatever, and but little for the prosecution. But the law officers of Government are not answerable for this; they were only called on to sustain the indictment as they found it. They, however, in my judgment, have failed to do their duty fully and faithfully; they were influenced, overwhelmed by the excited state of feeling along the frontier—any man could be readily indicted there; any county which would give rise to a mob and set at defiance the ministers of justice, is capable of finding an indictment, and conviction upon any and every character brought before them. The evidence of an unhealthy and unsound state of morals there, induced the removal of this trial elsewhere, and to bring it to the central part of the State; and old Oneida was selected as the fit portion in the State, where this trial should be had. And if we needed any evidence of the propriety of the selection, we have it in the

order and absence of excitement among our citizens—in the perfect observance of the laws of decency and propriety which has been manifested here upon this trial. I rejoice at it. I am willing, living in the center of the great State of New York, that an Oneida jury shall give a safe deliverance to an innocent man, and take him from the fangs of a combination as wicked as it is dangerous.

I have now gone through with the evidence on the part of the prosecution, and I ask if I was not warranted in saying in my opening address, that I had no fear of leaving the case with you where the prosecution had left it? I ask you, if you would feel justified in convicting even upon the prosecution alone—notwithstanding these midnight witnesses have sworn that he was the man who perpetrated the offense? I know you would not convict; it is impossible that you could give credence enough to this entire case, without one word of defense. Would you, upon such testimony, consign a fellow-being to the gallows? No! no such degradation would be cast upon the tribunals of justice.

But we are not at liberty to sport with the life of a fellow-being; we have endeavored faithfully, to prepare this defense, and I make my acknowledgments to my colleagues for thus preparing it; it evinces a greater diligence and faithfulness, on the part of those young gentlemen, than I have for myself any claim to the discharge of. But I came into the defense of McLeod at a later day than either of them. They dared to stand forth in the midst of a Lockport mob, which, aided and fortified as it was, made the magistrate quail, and called him out to apologize, for having dared to do his duty! My learned colleagues dared to stand up and send forth a manifesto to the world, that the conduct of the populace might be condemned by the world, and our country never again disgraced by such foul proceedings.

This brings me briefly to notice our case upon the defense of McLeod. It consists of two species of evidence which have been adduced before you. One by depositions, the other, evidence which was delivered orally, by witnesses on the

stand. And I am persuaded, gentlemen, that you will vastly better appreciate the testimony of those who have stood before you, than of those who have sent it to you by writing.

But who loses by it? Is this the misfortune of the prosecution or of the prisoner? It is our misfortune. Those who live in Canada would not come here. They are not to throw themselves within the grasp of these men who live along the borders, and are ready to seize upon any one whose life they can put in jeopardy by charging him with murder. They did not see fit to throw themselves in the way of prosecution. They could not come. We sent, and brought the testimony which they have given, and we now submit to you whether it be for this reason less worthy of belief; but here again, we are in darkness; the opposite counsel have said nothing in their opening remarks or in the progress of the trial, as to the manner in which they intend to treat this part of our testimony. I have taxed myself to know what they will say to detract from it, and I can find no plausible argument.

We commence with the evidence of Sir Allan McNab. There is but one single point of inquiry; where was McLeod on the 29th December, 1837.

If a man cannot defend himself upon such evidence, where, oh where, I ask can he be safe if accused of murder! Where is the man in this audience—who is there that can look back, and say where he was on a particular night, and call to his aid witnesses, to show where he was? Is there not difficulty in this? Is it not hemmed in with difficulty? It seems to me to be extremely difficult; and I regard it an outpouring of Divine benevolence that has put it in the power of McLeod to show so satisfactorily where he was on that memorable night. I ask if we have not first shown where he was not, and secondly where he was? Will it be the argument of our learned adversaries that they were all implicated in a lie? I consider that it depends upon the state of moral feeling which pervades the hearts and consciences of those men who speak, which determines the measure of credit which you will give to their story. If a man feels that he is a felon—

if he is conscious of being degraded—that he has taken the life of a fellow-being, and has justly forfeited his life: if he has broken his neighbor's house, and stolen his money, or committed any other offense which exhibits a man as degraded and sunk to the level of the brutes; then, indeed, may you doubt the story which that man tells; but think you that McNab of the army, or Drew of the navy, or McCormack of the navy, feel degraded by the part which they took in the destruction of the *Caroline*? Do you believe the British Government looks upon them as degraded? Nor are they degraded in the eyes of the American people; look over this vast continent and inquire of every single human being; interrogate men of intelligence, patriotism, and of consideration, and if you receive the response that they are degraded, then I will be willing to give up the defense.

How stood these men? They say they acted in obedience to the orders of their Government: I will say they did; but it is said that these men are degraded! that they were volunteers in the perpetration of a crime! Volunteers! Yes, they were volunteers at their country's call; into that service every man to the number of 2,500 did come forth voluntarily, in defense of his country. These then, are the degraded individuals! subjects of Great Britain and her dependencies. I trust I have American feelings as well as other men around me, but I speak of Great Britain, and her Government, as they are; if there is a country under the light of Heaven, whose subjects have reason to feel a conscious pride that they belong to it, it is that country—it is Great Britain, our own dear mother. To that country and her laws which have given distinction to monarchs, statesmen, jurists, poets, artisans, all will unite in rendering her a just meed of veneration. No country can reflect more honor and glory upon her subjects—none deserves better the love and veneration, not only of her own subjects but of other nations; and I ask any American, who claims to be a full sharer in this vast amount of national honor, which may well be accorded—descendants of British parents, who now have an opportunity to speak

the same language before an American tribunal; whether that is not the last country, where men holding commissions under its Government, and those under them, should feel degradation from obeying its orders.

It is said they were volunteers. I have heard of other volunteers before.

I will give you the memorable instance at Yorktown of the forlorn hope who led the attack upon the works and fortifications of Cornwallis. Who held and occupied the place of Captain Drew? That forlorn hope was headed by La Fayette—the forlorn hope of the American army was headed by Alexander Hamilton. They engaged in that perilous enterprise; and because a little chosen band have ventured to volunteer in the Canadian cause, are they less entitled to the honors and immunities of war? Never—never!

Because Captain Drew at the suggestion of McNab undertook this enterprise—because McCormack, Elmsly and Mosier, undertook voluntarily this enterprise, are they in the estimation of the world murderers? Never—never; until you can degrade Hamilton and La Fayette to the level of murderers. Well did McNab declare to one or two of his friends, by whom the danger of the enterprise was fully understood, “If you miss your aim a glorious winding sheet awaits you below the cataract.” Navy Island is scarcely a mile above the rapids which descend to the mighty cataract of Niagara. It is but about three-fourths of a mile from Navy Island to that place from which no bark ever did or can return; the current passing at the rate of six miles an hour, ten minutes delay would have taken them where their fate would have been remediless! Shrouded in darkness they put forth, and think you, when they encountered the perils of the deep, and of the darkness, and of the cataract, that those gentlemen whose names have been mentioned regarded themselves as murderers? If so, detract from the credit of their testimony.

If when the tables are turned, and Americans destroy marauders, who dare to tread upon our soil, for the perform-

ance of those perilous enterprises you commend them, then you will commend these men.

McLeod stands charged with murder. I wonder what would have been said by this country and this government, if the Canadians had come forward and planted their standard upon Grand Island, in the Niagara river, and our militia would refuse to drive them off? What would be said to them if they had not hearts equal to the discharge of that duty? They would no longer deserve the protection of the government; but I will not dwell upon these circumstances. I know the reputation of these men is to be assailed, and I have only done it to show that so far from their being engaged in an enterprise calculated to militate against their honor it should, on the other hand, elevate it; for almost universally where you find a brave man, you find a generous and a just man.

The question then is, was Alexander McLeod in that party? Who has the best opportunity to know? Is it those witnesses who come here on the part of the government, or the men who were engaged in the enterprise at the time? Col. McNab was a man who saw almost every man, and who actually knew a large portion of them. He knew McLeod well, and thinks he was not there; he returned a list to Governor Head, and McLeod's name was not among the number contained in that list.

Why was this list made out? I answer: it was because those who were engaged in the expedition had been engaged in a perilous enterprise. It had been successfully executed. They had returned, and having thus returned were entitled to the glory of the achievement; for it was thus esteemed by them. It is among the common occurrences that those who have distinguished themselves in battle, and encountered dangers, should have their names enrolled in the archives of the government. It was for that reason that a list was made out; and I ask you whether the evidence of Col. McNab alone is not sufficient to overthrow the testimony of all those who have been brought forward, on the part of the prosecution. Next is Mr. Harris, aid-de-camp to Captain Drew, he says

that he knew almost every man in the expedition, and helped to make it up. He says that a list of the names was taken down at the time of disembraking, and completed by another person who had it in charge, and furnished to Col. McNab, and upon that list the name of Alexander McLeod was not to be found.

Having disposed of these two points, I will dispatch another mass of evidence in very few words. It having been taken on commission, the questions must be general, and the answers are results; they never can contain details—but they present the great and leading facts contained in the case.

What is that evidence? It is that seven boats started on that expedition; that a certain number of men went on those boats, eight in each, except that of Drew, and that had nine. Five reached the Caroline, two lay in the stream for a short time, but ultimately boarded the Caroline. Two failed, and were obliged to return to the Canada shore. They landed on Buck-horn Island, for a time. The oarsmen were not good, and they fell back, but finally made their way, and landed on the Island to rest. They had to contend against the mighty current of the Niagara, six miles to the hour, to keep from going over the falls.

I ask you whether the men who had a hand in making up this party, and who knew Alexander McLeod, can be mistaken? Are they mistaken? Can there be any doubt, when they say they know not where he was? But one thing they did know: "he was not on board the boat which I commanded; he was not in the boat in which I went; that I do know." And that thing is the very thing which you are desirous to know; and, knowing it settles and decides the fate of Alexander McLeod. It is the only thing to understand—the only thing about which you need to be informed.

Was he on any of those seven boats? If he was, then your duty is plain, though painful. If not, then equally plain, and vastly more pleasant.

You have heard the evidence; it has been read before you; it is the evidence of brave and honorable men, who have no

cause to support other than that of truth. Believing them, then, there is no difficulty in finding that he was not on board the boats which left in pursuit of the *Caroline*. This one question, and this one only, remains to be considered. This is not material, except to show that he was not on the boats; as those officers who composed the party, and who have given evidence, have fully shown. I will glance at this evidence very hastily.

First, you will notice a little discrepancy in the evidence, as to the horse of McLeod. I presume that my learned friend will not forget about the horse, and he is welcome to all he can make of it. I regard it as wholly immaterial whether he had a horse with him or not, because we have strength of evidence enough, independent of it. It has been attempted to show that Press speaks of a different time from that spoken of by other witnesses. In no other respect is it material whether he took a horse or not. It is enough that he went, whether with or without the horse; but it is due to the case to say that you have heard the confession of McLeod, and his honor will tell you that, so far as it makes for him, it will be received. You have a right to consider it; and having considered it, if compatible with circumstances, and not contradicted, you have a right to believe it. McLeod says that he left after dark, having called for his horse; he may have been mistaken, he had so often gone from Davis' to Stamford on horseback, as well as every other way. He had so frequently passed along there, he may well have confounded one time with the other. McLeod says he rode in the wagon with Press, to Stamford. That was his confession. He says his horse was hitched to the wagon. Mr. Press says that he got into his wagon, having spoken before to get in with him: whether at Davis', or at Stocking's quarters, he is unable to tell you; but this much he does say, that he has no recollection of McLeod's having a horse with him that night. That he rode in his wagon, he knows.

Archibald Morrison says that he first saw McLeod coming into his father's house that night, but whether he came on

horseback, or otherwise, he does not know; but he put out his horse, and brought it up the next morning. But he had put out, and taken up the horses of McLeod so frequently, while they were kept at the stable of Mr. Morrison, that even he may be mistaken; because on that night, as well as on former occasions, he had put out the horse of McLeod.

Davis, the tavern-keeper, remembers well, that on the 29th December McLeod went to bed at his house, at about 3 o'clock; that he rose in the evening, called for his horse, and started; and that was the last he saw of him. It is due to Mr. Davis to say that McLeod had been there so often, and had his horse brought up for him, that he might be mistaken. Still this may be true, without in the slightest degree impeaching the veracity of Davis, of Morrison, or of McLeod. It would show that Press was wrong, when he says that there was no horse fastened to the wagon; that Archibald Morrison was right about putting the horse out; that McLeod is right, when he says he led the horse by the wagon, and that Press himself has now forgotten the circumstance that the horse was along. I make them welcome to either horn of the dilemma—either one or both. They need it, and they are welcome to it; this is wholly immaterial.

I will show you the starting point. How does Mr. Press fortify himself? He tells you that he kept a public house at Niagara; that on the 29th of December he went to bear two passengers to Chippewa; that one returned with him; that he made an entry in his cash book, because he has a partner. That entry shows that five dollars were paid as compensation for transporting those gentlemen to Chippewa. He cannot tell you, in the abstract, about making the entry, or about their paying the five dollars. One thing he does remember, that he went to Stamford and Chippewa; and as to the time, the date fixes it. It is like the entry of a name upon the register at one of the hotels in this city. Suppose the clerk should be called on to prove when a man was there, do you suppose he could remember writing every name upon the register of persons who put up there in the course of six

months? No; but he would tell you this: When a stranger arrives, if he does not write his own name, I write it for him; and I never make such entries unless they are compatible with truth. Further he cannot go.

What does Press say? He looks at his cash book and finds such an entry there, like those of a previous and subsequent date. Again, he tells you that upon the following morning he heard of the destruction of the *Caroline*.

What further have we? We have a witness of whom I had no previous knowledge till he chanced to come from Montreal here; we detained him on subpœna; he proves that this William Press was a friend of his for whom he entertained a high respect; that while in command at Chippewa, Press visited there and dined with him. After dinner, to pay the respect due to Press, he walked up with him to the head of Navy Island. That while walking up or down they saw the *Caroline* passing to and from Navy Island.

The evidence is that she left Buffalo on the morning of the 29th. That she made two trips from Schlosser to the Island, and then made fast at about 6 o'clock in the evening, and that very night she met her fate, by going down in a blaze over the cataract of Niagara.

If Captain Stocking witnessed that boat, it could have been at no other time than the 29th; if in company with Press, it could only have been the 29th.

Now, I ask you, gentlemen of the jury, whether there can be any mistake as to the time when Mr. Press bore McLeod to Stamford? This is the starting point. Here we stand firm and unshaken. Here is the anchor of hope to which we still cling; and I challenge the learned counsel on the other side to make this matter swing from the firm bearing that we have thus established.

Press leaves McLeod at Stamford. Where do we find him then? At Mr. Morrison's. But the public papers have assailed the character of this family. I am happy to learn from Doctor Hamilton of Niagara, that there is not a family of higher respectability in the vicinity. It is a family which

has not escaped affliction, and has felt deep grief; but I have yet to learn, that it has shaken confidence in that family, or furnished proper occasion for the learned Attorney-General to tear open the wounds which are scarcely cicatrized, by an examination of any member of the family.

Now, does that family stand confirmed in any way further? We have brought the deposition of Col. Cameron, and when objected to by officers of the government who conduct this prosecution, it did excite my surprise. I will not, however, repeat the sentiment I entertained, nor give further vent to the feelings which I suffered. Truth, justice—neither of them required that that deposition should be excluded.

It was taken in presence of counsel on both sides. Col. Cameron is a gentleman of high respectability, living at Toronto. He says he was at Chippewa when the Caroline was destroyed; that he left in the morning; that on his way he called at Captain Morrison's gate, and held some conversation; and he does not remember the substance of the conversation; but it proves another fact; that the news of the destruction of the Caroline must have been carried that morning and no other morning.

Was he mistaken when he tells you that it was on the morning after that memorable night? Was he mistaken when he tells you that on his way down the river he procured a trophy, and delivered a part of that trophy to Captain Morrison? Was that a matter of mistake? No, never. It is confirmation strong as holy writ. All point to the hour, and that hour alone which is material for the safety of McLeod.

But, gentlemen, this is not all. Miss Harriet Morrison, when asked, where next did you see McLeod? says, "I saw him in the afternoon of the same day, passing by. Making a pause in front of the house, he exhibited a cannon ball, which I understood to have been fired from the Island." Does she stand confirmed? Let us examine and see.

Young Gilkerson, an officer in the British service, says that on the night of the 29th of December he slept at Stamford; that the next morning, on his way to Chippewa, he fell in

company with McLeod. They were both on horseback; that, without dismounting at Chippewa, he and McLeod rode up the Niagara River; and the batteries on the Island were opened upon them. A cannon shot fell a little short of them, and one of the soldiers picked it up and handed it to McLeod as a memorial of the movement upon the Canadian frontier. Does not that go to confirm what has been said by Captain Sears? He says that he saw him come there in company with another man, and that they were fired on either in their ascent or descent. This leads me next to consider the evidence of the family of Captain Morrison. McLeod took tea there, and spent the night there; remained there until morning and took breakfast there; so says Mrs. Morrison; so says Archibald Morrison; so says Harriet; so say all.

If, after all this, you can doubt where McLeod was not, and where he was! I ask where you find a foundation for that doubt? It is so strong and so overwhelming, that it sets argument at defiance; and the case will set argument at defiance to effect its overthrow—it is right; it is true; and no man can doubt it. But there is another point of no little moment, fixing the time, and proving that McLeod was not at Chippewa. I have already alluded to the testimony of Gilkinson. I say he was away, when they say he was there. Is it likely that McLeod would go to Stamford and return back at that hour in the morning? Gilkinson's testimony is important, as it proves the truth of what is testified by the Morrison family.

Here is a gentleman in our own State, Judge McLean, who slept at the quarters of Col. McNab, at Chippewa, on the night of the 29th of December, and conversed with him in the evening, though we were not permitted to show what the subject of this conversation was; but this much we have a right to show that, during the evening and morning, Judge McLean did not see McLeod at Chippewa, although he had seen him at Buffalo, on the 24th of December, and put forth his hand to shield him from the violence of a ruthless mob.

It was natural that he should have inquired for him. If

he had been at Chippewa, would he not have inquired him out and seen him?

Judge McLean tells you that after breakfast, between 9 and 10 o'clock, he left Chippewa for Niagara Falls, and on his way, in company with Doctor Foote, he met McLeod, and knew him. If this be so, it is in conformity with the tale told by the family of Captain Morrison.

Would not Judge McLean be as likely to know as any of the witnesses that the government has brought here to uphold this prosecution? A man who knew him well, and not shrouded in darkness—would he not have seen him if he had been there at the dawn of day, or at sunrise—or later in the morning, before McLean left the village, as well as those witnesses, Smith, Corson and others?

I think you believe with me, that he would have been far more likely to have seen him, having inquired for him, and being despatched there by the District Attorney of the United States, to consult with McNab. Would he not have been likely to find McLeod, if he had been there? Not having done so, proves that McLeod was not in Chippewa; and having met him at or near the Falls, riding toward Chippewa, puts it beyond all doubt.

If McLeod is unable to defend himself on *alibi*, I despair of defense. If necessary to prove him at Chippewa, as was urged by my eloquent young friend, instead of his being at Stamford, it would have crushed us to the earth. Had he been accused of a murder perpetrated at Stamford on that fatal night, it would have been impossible for us to prove an *alibi* with all this crowd of witnesses to swear, that at midnight they saw him at Chippewa—some of them within ten feet, others, at cock-crowing in the morning, saw him somewhere else; and when daylight had streaked in the East, he was in a different place.

Could they stand up against the overwhelming testimony of the Morrisons and those who corroborate their statements? The evidence showing where he slept, where he remained,

and where he might have perpetrated the crime, if he had conceived it in his heart, cannot be destroyed by that which attempts to prove him at Chippewa; and I need not add one further consideration to what I have already stated, because the strength of our defense is so overwhelming that there is nothing of the prosecution left. It is enough; there is no cause of doubt. It is enough that the doubts and probabilities are on the other side. Juries are usually reminded, that where a doubt exists, the prisoner should have the advantage of that doubt; but I will make no such appeal to you, for the evidence shows that, so far from having participated in the destruction of the *Caroline*, he is as free from it as you, or the learned counsel for the prosecution, or those who have conducted his defense.

Having taxed your patience beyond endurance, in discharge of the last duty which devolved upon me, I commit him to your charge; and if I have not deceived myself as to the duty which still remains for you, it will be as pleasant to you, as it will be propitious to our country.

MR. JENKINS, FOR THE PEOPLE.

Mr. Jenkins. Gentlemen of the Jury: Owing to the great variety of subjects which the learned counsel for the prisoner have seen proper to discourse upon, the remarks which I may make, may be regarded as scarcely an answer to them. I had supposed when we appear in courts of justice, it was to try causes upon the facts established, not upon extraneous circumstances which do not pertain to the case. It is utterly impossible that a court or jury shall understand the cause, and be able to decide it, unless they arrive at the facts through the medium of legal evidence. Much that has been said by the prisoner's counsel is addressed to men in England, not to Americans; to those who will not decide the issue in question; not to this Court and this jury. I concede that it is proper to look at the position of the two countries—to the position of Canada, and of the insurgents upon Navy Island, and in our own country, for the purpose of as-

certaining the position of those concerned. But when we go beyond that, we have exceeded the bounds of our duty.

What, I would ask, was the situation of the two countries at that time? We all know that Canada had been afflicted with ruptures within its borders. We know that some of her inhabitants, considering themselves aggrieved, had been judged guilty of a violation of the law; and they had been punished with death. The State of New York, and others, deeply sympathized with those who had been arrested. Was it not to be expected that there should be people in Canada desirous and anxious to press forward and accomplish a revolution—that some individuals in the United States should sympathize and unite with them in accomplishing their design? Is it not matter of surprise that from a republic containing 17,000,000 of people, only some two or three hundred should have been found congregated at Navy Island? If there were no more, it is a cause of reproach to the British nation, that a handful of insurgents should agitate and alarm the whole empire.

The facts upon this trial show that this is a peace-loving community, having no disposition to disturb their neighbors. There are individuals here, as in other countries, who will sometimes unite with others in waging a fruitless war. When this nation was sympathizing with the sufferers at the North, and those who had created the disturbances in Canada were desirous of establishing there, a government like our own, is it not surprising that, among this immense population, so few hundreds should be ready to join in the combat? Prior to the burning of the *Caroline*, and the commission of the murder in question, little excitement existed in the United States relative to the northern difficulties. It is true that a man by the name of Van Rensselaer was on the Island, and had command of a few men whom he had gathered there. It is said they were there for the purpose of invading the Canadian mainland. What had they to expect when a large British army was assembled in their immediate neighborhood, and only some two or three hundred upon the Island? They could not expect to maintain their position for a moment.

They could do but little mischief, and therefore no extraordinary measures on the part of government were called for. In a single hour the English army could have made their way across the river, and captured every insurgent.

This is pressed into the subject, as though the Canadas were in danger of being revolutionized! To show that the Canadian authorities were authorized to make extra exertions to destroy this boat, then floating in American waters, the forces of the insurgents are magnified from a handful of men to an immense army, and this little ferry boat has grown into a vast engine of war. The only purpose for which this subject is pressed into this trial is to form some sort of apology thereby, for the destruction of that vessel. The Supreme Court have decided that, for any purpose of justification, the warlike movements on Navy Island are to be laid out of the case.

The vessel was seen at some 2 or 3 o'clock in the afternoon of the 29th of December, '37, plying between Navy Island and Schlosser. Who saw her? Alexander McLeod. To determine whether the prisoner was there, it is proper for us to ascertain the bias which he had previously entertained on this subject. For if he were opposed in principle to the destruction of the boat, more proof would be required to establish the fact that he was in the expedition, than if he entertained the opposite opinion. Establish the bias, and the man is not far distant. I therefore ask your attention to the position of the prisoner at the time. He says in his confession that the Governor of Canada had requested him to go to Buffalo and ascertain whether she was to be sent down to Navy Island. The consummation of that mission, which took place on Christmas eve, 1837, in the city of Buffalo, it appears from Capt. Appleby's testimony, was effected under strange circumstances. Such was the tumult which he excited, that he required the aid of Appleby and McLean, to escape, and he fled from the house top. How he got away, not being a witness, I am not at liberty to state. On the day following he returned to Chippewa, and gave intelligence of what he expected would occur, and made affidavits to the

facts. What does he do next? He says in his confession, that on the evening of the 28th he was about to go to Niagara, the place of his residence, and had advanced as far as the falls of Niagara, and there received information that the Caroline had left, or was about to leave, for Navy Island. That he returned and informed McNab that she was about to come down. Did not that man feel some interest in the transaction? Was he not essentially in the employ of the Government. Surely he was a spy. And most admirably did he perform his duty. What next? On the morning of the 29th he, with some others, went into a boat and passed round Navy Island, for the purpose of reconnoitering. I would ask, had he not some motive in view? Surely it must be so. He felt extreme anxiety to know when she would arrive—and for what purpose? To destroy her the moment he could have an opportunity to do so. Why was the prisoner at the bar spending his time at Chippewa? For what purpose? Was this his residence? No, it was not for ordinary business that he remained there. Had he any such business that appears in evidence before us here? For what purpose, then, was he remaining at this place? It was for the purpose of carrying the project of destruction into execution. Had she been found at Navy Island, it would have been a different question. He knew that she was plying between that island and Schlosser. He saw her cross to the Island twice and back, and at night she let off steam and laid up by the American shore. Now, I ask you, where is McLeod when the boat is safely moored at Schlosser? He had been round the Island in the morning, and a number of witnesses have spoken of the fact that the boat was there laid up at the dock. Now, what would you not expect when a man was so anxious as he was to accomplish the mischief—the man who had been a spy at Buffalo—who had made affidavit—who had returned from the pavilion at the falls—who saw her passing back and forth, in full view—who was found in private consultation with the commanding officer of the expedition? See how faithfully the bent of his inclinations tallies with the fact!

Corson swears that on the afternoon of the 29th he was in the store of Macklem. That the prisoner, Capt. Drew and others were there. They were not sitting in the business part of the store, but in the back part, surrounded with glasses, as if to take something to bring their spirits up to the nefarious deed. Not a word has been offered to show that he was not there in that consultation. When witness went into the store, though frequently there, and from a house trading much there, yet he was requested to go out of the store, by the clerk, who says they have some private business on hand. During these few fatal hours that the prisoner was there, the plan was matured to destroy the *Caroline* that night.

The keeper of the hotel, Mr. Davis, testifies that, in the afternoon, some 2 or 3 o'clock, the prisoner came to his house and desired to go to bed; that he did go to bed, and slept till between 7 and 9 o'clock. The prisoner in his own declaration or confession which we have heard, says that he thus went to bed and slept till about 7 o'clock. Now, if he had been then concocting this plan, would he not desire to obtain some rest, and thus prepare himself for the conflict? Having regaled himself upon the wine, it was to be expected that he would take a bed, knowing that this would be a night expedition, in which there would not be much opportunity afforded to obtain rest. He did so, and there remained until his energies were recruited. Thus far we have not gone upon disputed ground. But we have shown what his feelings were—what his inclinations, and what the service in which he was engaged. Is it probable that he, knowing that the *Caroline* was there, and being thus anxious—is it probable that he would go to *Niagara*, when she was in reach, and her destruction was contrived, counseled and resolved upon? That is not to be supposed. Now, if he had been averse to any such movement or procedure, it would afford evidence in his favor. But even Morrison says that when he first heard of it, he exclaimed, "I wish to God I had been there." This goes to show that he was favorable to the transaction, and that he was the last man to have quitted the ground, after the arrival of the *Caroline*, until she was destroyed. I have

thus established this one thing, that the inclination of the prisoner was to be engaged in that transaction and, by the sleep, which he had taken, that he was prepared for active employment in the affair.

Now, let us see what that affair was. I do assure you that the learned counsel, with their ingenuity, have not given to it its natural and due course. I am satisfied that you have felt it; that every man who has heard the counsel has felt it. What is the evidence? On the 29th of December, the guard on board the steamboat *Caroline* ascertained that boats were approaching. One of the guard went to the cabin and called to the captain to inform him of the fact. The captain did not suppose that there would be any difficulty, and the guard went again and gave the alarm, and the transaction occurred which has been minutely detailed to you by the witnesses. The persons on board were alarmed; they feared that their lives were to be taken, and perceiving how others were surrounded by the assailants, they used all the means in their power to make their escape, and did not observe with as much minuteness as they otherwise would have done.

I notice one single one of them: Capt. Appleby had seen the prisoner but a few days before; that is, on the 24th, the prisoner being in difficulty at the time, and desirous of making his escape from Buffalo, fixes his attention upon him, so that he knew and recognized his countenance. He had been at the cabin door once, but turned back; but he again went to the door, and just as he opened it about a foot, a person from without wrenched it open and a sword was thrust at him, which cut off a button of his vest, and was warded off by a metallic button on his pantaloons. It was but an instantaneous sight or view that he had, but he thought then—and thought the next day—and thinks now, that the person who made the thrust at him, was Alexander McLeod, the prisoner at the bar. Upon the cross-examination he was asked, "Will you swear that it was Alexander McLeod?" All that he could say was to repeat what he had already said, that he then believed it—he believed it the next day, and still believes that it was the prisoner at the bar. Do you not sup-

pose that when the light was shining full in his face, he would be likely to recollect his countenance? A countenance like that blazing in his face—it would implant an image never to be effaced from his memory. Such was the impression, and he will never forget it till the day of his death. Capt. Appleby is careful in his manner of testifying, but his impression is that that was the man who made the thrust at him; that he was the man at the door of the cabin, when the captain attempted to make his escape. The learned counsel for the prisoner says that all this evidence is made to suit the case. At one time he does not believe the witnesses, because their testimony is contradictory, and now he does not believe them because their testimony harmonizes. I agree with him that truth is consistent and reasonable. When a man does tell the truth, it is plain on its face that it is the truth. When a man prevaricates, and tells that which is not true, you see at once that it is stamped with falsity. You give it no credence, but say that it is false upon its face. The next person we call upon is Samuel Drown, and to what does he swear?

It is well to stop here and look at this case. What were the opportunities for this man to see the prisoner? He recollects distinctly, of seeing him disembark. He heard him converse, and saw him there the next morning. Though he did not stand so as to have the benefit of the light directly, yet he could see the form of the face. They insist, on the part of the prisoner, that this man is impeached, for if they did not insist on that, the proof of one, if believed, is as good as twenty. Now, I ask you, if a man who is a humble man—a plain farmer—appears upon the stand without disguise, and seems willing to tell his simple story, they call upon a witness to impeach him, and to whose testimony I shall ask your attention, they call upon a respectable man living in the vicinity, and what does he say? After they had taken him, he did say to his brother, if they could not get a bill against McLeod without his testimony, they could not convict him with it. This witness, Mr. Bates, says that Drown did say to

him that he did not know enough to do McLeod any good or harm.

Whoever has been in the habit of attending courts and consulting witnesses, is aware that that they will often say, "I know nothing of any consequence." It is a common remark with men of integrity who are willing to tell the truth. Why, the thing is not uncommon. There are men so ignorant as to suppose that you must prove not only that the prisoner was on the ground but that he was seen giving the mortal wound. This man, therefore, made use of the remark which he did, that he knew but little about it. Now, this is a mighty impeachment, for which a man has come all the way from Canandaigua to say—that Mr. Drown had informed him in this way as to his evidence. Now I ask if this is the impeachment which the learned counsel has magnified into a mountain, and for which he says the witness has committed wilful perjury.

Did his testimony not show as to the importance of it? He did not detail the facts. If he had stated things differently from what he has sworn to, then we might well say that he had sworn falsely, but when one witness comes in to contradict another, and does not contradict him, it shows that they have attempted to make an impeachment and have not succeeded. But what does Mr. Bates say? He says, expressly, that he has been acquainted with Mr. Drown for many years. That formerly he was a dissipated man, and a man of not very good character; yet before he went to Canada he had reformed and had never since returned to his evil practices. I ask, whether a man thus reformed, who conducts himself and pursues a wholesome course of life from year to year, and then comes into a court of justice—I ask whether the opposite party should travel back and say that seven or ten years ago that man was a drunkard? I say when Mr. Bates came forward and testified as he did, it added to the character of the witness instead of detracting from it. He, the witness, Drown, said he did not know much of the matter; he could not judge of its immense importance. It was a mere matter of opinion. If he had stated the facts and Mr.

Bates had come forward and stated differently, it would have been an impeachment. This is all that I consider necessary to say of Drown, for the gentlemen have made use of many remarks respecting this witness which I deem unworthy of an answer. But thus far I did think worthy of being noticed. The counsel for the prisoner say that all are combined, and come here with a determination to sustain one another. Has not the learned gentleman drawn very largely upon his fancy to induce the jury to believe transactions which have never existed? It is true the argument was more like evidence than argument; more than one-half of it related to that which did not exist in the case. Strike out that which does not pertain to the case and weigh the remainder in the scales of intellect, and see if it is entitled to much consideration.

I might as well here remark that the four witnesses whom we first called to the stand pertaining to this subject I regard as the most important—as the all-important ones for upholding this prosecution. The next witness is Isaac P. Corson; I know you recollect him. He has been an inhabitant of Canada but is now an inhabitant of this State. He does not live far distant from the scene of this disgraceful affair; and if his character for truth was not good, remember, the vigilance of the counsel for the prisoner would have sought out those who would attempt to impeach his reputation. Not having done so, I set it down that his character is good, that he is unimpeachable in the neighborhood where he lives, and that he is not liable to have odium cast upon him here. You are to judge from the facts which he testifies to, the appearance of the man, as I apprehend, would give confidence in his integrity, and yet the learned counsel—and it was particularly manifest as to Mr. Corson—found fault with his manner and tone of voice. And in everything that pertained to his mode of cross-examination seemed to say, “You have sworn to a lie, and I mean to have the facts out of you.” The learned counsel has browbeat the witnesses, and put their characters in as great hazard as were the lives of those who were in the Carilone. I suppose that in any country, whether

Niagara or any other, where counsel put questions in the manner that they have done in this case, making insinuations, sneering continually during the examination, there is no witnesses who would not feel indignant. I do not cast reproach. I make these remarks to show the impropriety of going over the whole life of a witness, and asking questions which would put any man at a loss to answer. Well, what was the result of it? It was a short story which will carry belief with the proof as long as they shall recollect. The witness stated that he heard McLeod say that he was there, and that "he would like just such another expedition, to go and cut out, and burn Buffalo."

On the 24th McLeod had been at Buffalo; he had noticed him to leave the city in a manner very disagreeable to his feelings, and no wonder that he should have feelings of indignation against that city. He said he would like to serve Buffalo as he had served the Caroline. He admitted that he had assisted in the destruction of that boat. It was only necessary to show that these sentiments were uttered over and over again, so that there could be no mistake. I do not wonder that this man has made these confessions. But you should consider where he was when he made them. It was to those who were engaged in this cause. It shows that he was proud of having done that which he may have thought his duty to his country; being at the head and almost the first upon the boat in performing that act of which the people of this country have a right to complain. I ask you then why not believe the testimony of this man in connection with that of a dozen others when these men come forward and swear to that which is corroborated by circumstances before and since? A jury would be extremely derelict from duty if they did not place reliance upon it. Will a jury sit here and listen to all this about combinations? Shall counsel ask a jury to believe their own statements and call witnesses to impeach and set down other witnesses as not to be credited, as we have witnessed on this occasion? If that is to be the case, the sooner courts are done away with the better. Instead of being a trial upon the evidence, it is the merest farce. You

are to weigh the force of evidence. It is not only your right, but it is your duty. But when you have weighed it you are not to consider the witness impeached, merely because counsel have said so. Suppose that witness had appeared in court without any such strong remarks from the opposite counsel, would you hesitate to believe him? No, that never would be the case. Any man who has heard him and witnessed his intelligence as detailed here upon oath, in the presence of this Court and of his Maker, would place reliance upon the evidence of that man without stint or allowance.

I feel that I am standing before a tribunal who are able and willing to examine this case upon the principles of law and justice. Although I admit I have been disappointed in some decisions which have been made, I do not doubt that they have been made honestly, though possibly made mistakenly. I am willing to rely upon the evidence before you, without regard to what may have been excluded. I am willing to place the case before you on that evidence, and have you pronounce guilty or not guilty.

When I heard it announced by the learned counsel in presence of this audience, and the Court, that they expected a jury to bring in a verdict without the least possible question, and that they only felt embarrassed because they had nothing to argue, because the case was so clear, that your verdict would put an end to the subject of war—when I heard that subject drawn into this trial, I felt alarmed for our institutions.

Shall it be said that, when men stand up to argue upon the guilt or innocence of an individual, they should take into consideration whether it shall produce war or continue peace? I trust that no such sentiment has ever been before announced in this land. If advocating this case before a British court and a British jury during the period of 1837, then I might suppose that an appeal of this kind might have had some influence in inducing a jury to be led astray by their prejudices. But when addressing a jury in the county of Oneida, the place of my adoption—when addressing many of my personal acquaintance, I am satisfied there are no such preju-

dices to gratify—that you are willing to pronounce upon the question, whether guilty or not guilty. I feel a confidence which inspires me with courage sufficient to produce conviction, and inspire a belief that you will give an honest decision fearless of all consequences.

If we are to consider whether it is to produce consequences beyond the immediate effect of your verdict, where are our courts and our institutions? It would seem as if the learned gentlemen had supposed themselves in another nation. I awoke almost as if from a reverie, in a country under Great Britain; not the island of England, because there is as much justice as anywhere. They would look with contempt upon any such insinuation being thrown out. Where such arguments are introduced into courts, and before a jury, shall they be listened to? Can we not, I ask, bring up feelings of justice more strong and powerful than any extraneous matter which pertains to policy or expediency? I am astonished that these allusions have been made and held out to you, that your verdict is to make war or peace, and therefore you must ease your consciences by coming forward and pronouncing a verdict without considering the evidence, and thus lean to the side of peace.

Gentlemen, this is not the way in which we are to view this question. If we look to the history of our country, I should regard it as the commencement of that system, which if persisted in, would allow the British Government to take away our soil or anything else.

How was the right of search exercised previous to the last war with England? It began with the plausible pretext that they only searched to take such as belonged to the British nation—under that pretext how many have been taken from their families and homes, and never returned to their native land? Sworn away by false witnesses, and continued away until their deaths, and never permitted to return. If this is to operate with the jury, and our laws that are applicable to subjects of another nation, who commit depredations, how soon will the people upon our frontiers be snatched out of our hands, and lose their lives for any imaginary offense? I

say, therefore, in answer to this, that it is our duty—it is the duty of the Government of this State, to maintain the integrity of our dominion.

Let it be understood in every nation and kindred, that when men are within the territorial limits of New York, they shall be protected and their lives preserved. They shall not be encroached upon by any nation whatever, though they can control one hundred and sixty millions of people, while we have but fifteen millions. I rose with the principle in my mind, which has ever been inculcated, that this question was to be decided according to its intrinsic merits, as developed by the evidence.

It is conceded, that if Alexander McLeod was on board those boats, and engaged in that transaction, he is guilty of the crime with which he stands charged; even if there were no other evidence than that of the three to whom I have already alluded, together with the fact of the death of the deceased, Durfee. Would any jury in this country, or any other country, hesitate to pronounce that man guilty? I would be astonished if they would do so. I do believe that any jury or court would yield their sanction, and their credit, and their faith, and pronounce the prisoner guilty, without the least delay. But we do not stop here: we go further, and introduce witnesses in corroboration of these facts; and the only attack which can be made upon them is, that they so completely correspond in their testimony, with the facts charged, that it must be false or fabricated. A doctrine as strange as it is new, in any court of justice.

Charles Parke is a native of Canada, and never belonged out of the Province, as is the case with several of our witnesses. He never belonged to any of the societies which have been mentioned. Is it possible that a society so saps the morals of men as to render them entirely unworthy of belief? If that be so, we have got into a new sphere of action in relation to the administration of the laws of the land.

The witness yet resides in Canada; he is a farmer—a man well known there. He set out for the purpose of coming to Buffalo, about the time of the commencement of this court,

and ascertaining that the trial was about to come on, though he had business in Buffalo, he concluded to return home, and wait till the trial was over. He is not one of those who might be liable to the charge of want of integrity. He resided in the very village and house where Davis did.

The vigilance of the learned counsel, through the particular friends of the prisoner himself, and the whole British Government, would surely have been able to produce those men, or to have taken their testimony on commission, who could impeach this witness, if he was in truth liable to impeachment. He came to Chippewa, and there ascertaining the fact of the trial being about to take place, and being unwilling to come, returned to his home. The first week of the court having passed over, he again went to Buffalo, to attend to his business. He was discovered in Chippewa by a person who crossed the Niagara, and who, taking a different route, was ready as soon as the witness rose from his bed the next morning to subpoena him to appear in this case.

Now, the learned counsel says this was all a trick on his part. I ask where is the evidence of it? Is there the least evidence of the fact? If so, I have failed to hear it. He did not know the effect of a subpoena, other than it laid him under a penalty of fifty dollars, and he concluded to send his horses back by his brother-in-law, and come to court. And this is made a subject of impeachment, as though what he has said under the sanction of an oath is nothing worth. I never have seen counsel driven to such extremities. His whole story is, from the beginning to the end of it, a continued chain of transactions bearing the impress of consistency.

Let the gentleman's argument be published, as it will be published, and I am glad that an argument of that description is to be published; so that if a jury brings in a verdict in conformity with it, that this enlightened community may see and know how it has been accomplished. But if the solemnity and sanction of an oath—if duty to his country, to himself, and to his Maker—if the ordinary laws of our country are to have their wonted course, I shall be proud of submit-

ting the question to you, whether Parke is to be believed or not. What does he testify? I shall only give an extract: He says that he was Davis' barkeeper, that McLeod directed him to tell his brother that he was gone to Niagara. Now, what was that done for? Was it not known to him that Corson and others had seen him in conversation with Drew? That it was whispered in the public mind that the Caroline—the thing which had occupied so much of his attention, and which had caused him to go to Buffalo—to go round Navy Island—to return from the falls the night previous—that something was to be accomplished? For the purpose of not allowing them to know of his actions, he designed to put them off their guard, by saying, bring up my horse, I am going to Niagara. Who brought up his horse? He did not bring him up himself. Now, if there was a man who brought out his horse, do you not suppose his testimony would be brought to bear upon this trial, personally or by deposition? Yes, he would have been the first man.

Whenever you find two witnesses essentially corroborating each other's testimony, and establishing the same fact, and there is no inherent evidence of its untruth, it gives to it a force in arithmetical progression; if you add a third it is stronger; if a fourth, it continues to increase in strength. Now, the force of this testimony, all tending to one point, is stronger and of higher verity than if sworn to by one only.

Henry Meyers of Canandaigua swears that he saw McLeod at the falls of Niagara, where he stopped at a house on the north side of the road. He had previously seen him at St. Davids; some one asked him who shot Durfee? McLeod said, "By God, I am the man." He then said, "That is the pistol that shot him." Now, how do they seek to impeach this witness? He is made to go the grand round, to show where he was born, and where he has lived. I would not have said a word, if the learned counsel had not recommended you to look and see whether the witness had pursued the most direct route to get to the several places named. I have no objections to your looking at the map, but those who are better acquainted than my learned friend or myself with the points

at which he arrived, say that the route was the most direct that he could have pursued, except where he varied it in order to get better sleighing. And think you—when that learned gentleman is surrounded by many high in station from Canada—think you they would not be called on to testify and show the falsity of this evidence in that respect?

Gentlemen, I am astonished that my learned friend should have gone so far beyond his ordinary prudence—but he cannot blind men, with things so feeble and futile, upon their face.

I do not contend that this man has as much weight of character as more substantial men, who live in one place and are not moving about, yet he is not unworthy of credit, they have not impeached him at all; nor is his story improbable. For the whole course of proceedings, from first to last, showing that McLeod had been willing to boast, that his queen, and England might know that he had been a dutiful subject. It has been said that the declarations of men are not the best evidence. It is not like that of a man who sees with unerring certainty; but still it is evidence and you are bound to allow it some weight. But I do object against going out of the record to impeach this man, for I verily believe he has told the truth, as nearly as he was able to set it forth.

The witness says that McLeod had a sword and a pistol. The stock of the pistol was painted red. I care not whether it was or not. He saw it and, it was stained, no doubt whether with the blood of Durfee, or of anybody else, or not blood at all, it is evident that the prisoner wished to hold out the idea that he was the man who had committed the deed. We introduce this man, for the purpose of showing that McLeod confessed himself to be on this excursion. When we have taken the testimony to that extent it has performed its office.

Gentlemen, add that to the foundation work, which has been erected in this case, and let the learned gentleman produce all the force he can against it, and we will see whether

He has been able to raze its foundation. Calvin Wilson was acquainted with the prisoner, who in reply to a question from Raincock said there was one thing which he did know, and that was, that one damned Yankee got shot on the wharf. Now, they have undertaken an impeachment of him also; and they have shown by Alexander C. Hamilton, a lawyer of undoubted respectability, that Raincock had left the place before the time alluded to. But is it not possible that he had gone to the American side and was back there on that occasion? Hamilton swears that he ran away for debt, and others say that he did not run away for debt. Now who knows but he resided near by there? It is a fact which I am ready to concede, that it has shaken his testimony and it belongs to you to say, how much credit it is entitled to. If you throw it altogether away there is enough left.

Seth Hinman lives in Youngstown, he saw McLeod on the evening of the twenty-ninth, and at seven o'clock the next morning; he was once in a Hunter's Lodge. He has no doubt that he saw him about sunrise. This does not prove that he was on board the boats, but it goes to prove that what they set up, in defense, is groundless. And I shall have occasion to advert to the circumstances for that purpose—to show that he was there about sunrise, and therefore probably one of the party. I ask why was he up there thus early in the morning? Is it improbable that he should be up thus early in the morning? He had taken a sound sleep after his wine drinking, and had risen in the morning. There is no proof that he was there positively. The officers there were up at an unusual hour in the morning, which shows to my mind that he was there drinking over the fatal deed which he had accomplished.

William W. Caswell saw him come out from Davis' about nine o'clock in the evening, and go towards Mecklem's store, where the consultation had been held, and in the direction of the embarkation. He undoubtedly went there for the purpose of embarking. Witness saw him about sun-

rise the following morning on Davis' steps. Prisoner said "We made the damned Yankees run." Now, do you not believe he said that? Do you not suppose, if you had been in Canada, a citizen of the United States and looking on that transaction, he being a deputy sheriff, and being in that transaction and confessing that he did a certain act, do you not believe you would remember the substance of it as long as you live? It was not like the every day occurrences that take place in a neighborhood; here was an important fact divulged.

When a man comes forward, in open daylight, and makes such statements; how could an American drive them from his thoughts? They will be with him to the latest day of his existence. McLeod also said that he saw one man dead on the dock; he had a pistol in his hand; now I ask whether this will not convince the mind of any reasonable man that McLeod was a participator in that affair.

Anson D. Quinby saw the prisoner come out of Davis,' about nine o'clock. The next morning he saw him not far from the bridge, and some of the colored troops about him. Some one asked how they made it go last night. The answer was, "we," or "I killed one or two damned Yankees." Do you suppose that he had forgotten? I apprehend the jury will wait long before they forget the circumstance.

Justus F. T. Stevens says he saw the boats depart and return, but upon the testimony of this witness very little reliance was placed.

Timothy Wheaton is less explicit than the others.

We have called no less than twelve witnesses, all showing that McLeod was there, and yet the learned counsel has stood up here and proclaimed to this Court, and audience, that it was the duty of the Attorney-General to abandon the cause! But for my personal acquaintance with the learned counsel I would set him down as a maniac. I do not say that he intended to misrepresent.

Now let us go through with the evidence on the part of the prisoner, and see how far that changes the force of the

evidence which I have recapitulated. Perhaps I ought to remark, before proceeding that it has been said by the distinguished counsel that he has impeached the testimony of Anson D. Quinby.

Well, let us see whether he has. Did you ever know a man impeached by introducing a single witness against him? If you were going to impeach a man, would you go twenty-six miles from the residence of the individual to get a lawyer who had been employed for the express purpose of impeaching him, and who when he came upon the stand did not impeach him at all, nor attempt it? Would you subpoena that man and rest your impeachment upon his testimony or even upon that of a Justice of the Peace? When it appears that no longer ago than a few weeks, he was called upon the stand and an effort was made to impeach him but abandoned.

The learned counsel has said that the post office has been made use of improperly. How did Mr. Lott of Pennsylvania—this Justice of the Peace, of no politics, do? Did he not communicate through the post office, and was not intelligence sent to the counsel, and Mr. Lott invited here through that channel? And that is the man who comes here out of the pure love of justice, all the way from Pennsylvania! I suspected there was a moving cause, planted deeper than we can see. This is the man who is willing, voluntarily, to communicate intelligence, through the mail, for the purpose of getting a chance to come and swear on this trial. Why, gentlemen, this is a novel mode of impeachment; it is not much stronger than the learned gentleman's argument without any proof, and not half so amusing.

Here we happen to come upon a principle of law—if a man goes into a neighborhood for the purpose of inquiring whether the character of an individual is good or bad, and inquires of A, B, C, and D, and they all say bad, and so on through the town, and this man comes forward to testify, the Court will say "you are not a competent witness." It

must be a person living on the ground. The Court is familiar with the doctrine.

Therefore the intelligence which this lawyer obtained is wholly useless.

It was not to be expected that when we had to draw intelligence from the other side of the fatal Canadian line, that the principal men would come. It would be useless to go there to take depositions. You might be sent back perhaps with a bullet in your head. We cannot expect that men of wealth and high standing, of rank and dignity can be brought here as witnesses; but it is men from the anvil and the plough, only, that we are able to procure. Shall a man's integrity be weighed by the weight of his purse? Is it not believed that the laboring classes of the community are the honest ones, rather than those who are engaged in speculations, to which the laboring classes have not access? Persons who labor for their living have but their character to bear them through life credibly. These men, when unimpeached, are the men to be believed; when you undertake to impeach a man whose character is not good, how much easier is it to take a poor man than a rich one. Take a rich man, and the first thing is, I know that man can injure me, possessing as he does, property and power. But take a man who is penniless, having nothing but the hands with which he gets a living, and how easy it is for wealth and affluence and power, backed up, as on the present occasion, by the British government, by able counsel, to crush the poor man! I ask you not to shut your minds against the poor man. I apprehend that when they come to get through with it, the gentlemen's charges against the Attorney-General will show to this country, to England, and to the world, that this prosecution is brought in good faith, and carried through in good faith.

We now come to the prisoner's defense; and there is one circumstance which the jurors should have in their minds, as much as the carpenter his square and compass. It is that when a person testifies to an affirmative fact, his testimony

is stronger than that of the witness who testifies against him. If I should see a person in this audience, and it should become important, next year, or the year after, or five years hence, to prove that man was here, and I should be called to prove it, and swear that I saw him here, that I recollect the fact; suppose, then, that forty others should be called on to say whether they saw him, and they should say that they saw almost every other one, but did not see him, would you be at liberty then to say that my testimony was impeached, although they could say that they knew a great many, and that he was not one of them? Now, I want to know if that contradicts the most feeble evidence? Here, then, is the long and short of the argument; and of this character is the testimony of Capt. Sears. This man, who was in the conference of the British government, a sort of link between the black and the white races, standing where the complexions meet both ways. He is a man who appears pretty well, and has a reasonable amount of intelligence. The Attorney-General did examine him more severely than any other, and his answers did appear pretty frank, and quite intelligent; but if they had been strictly true, they would have had more weight. He goes too far, and swears that they were all in darkness, so that no one could see; he says it was very dark. He was asked whether he could see his friends. He answers yes, and there were five of these men engaged in this glorious deed, which has been compared to the seizure of Yorktown. But he cannot name the persons who were engaged in this black deed of butchery, and he had reason, I suspect, for not doing it. He says that he was in Davis' tavern several times in the course of the night; and that he saw Davis, and conversed with him. Davis swears that in the course of the night he did not see him at all, but that he was in bed. Now, what shall we say to the testimony of Capt. Sears? I should call this at least a contradiction, which detracts from the force and power of his evidence. It was so dark that he did not see Sir Allan McNab. No wonder, then, that he did not see the prisoner. There seemed to be a mysterious power in

that man; the moment he turned his eyes toward a friend, he could see him. I do not know how it is in Canada, but in this country, I should doubt very much if this peculiarity exists. He was about the beacon light, but did not see McLeod, although it is possible that McLeod was there. He was asked, did you see Drew, the man who commanded? He says, yes, I saw him. Was there any man in uniform? No, is the answer. He saw Drew, and could swear that the prisoner was not there. Another witness swears that Drew was the only man in uniform, on that occasion. How could he identify his friends, and not be able to tell whether the commander was in uniform? Harris swears expressly that he was thus dressed, and that he was the only one. But this distinguished captain, when brought here, says that when the boats were passing up and down, no one was permitted to pass unless they gave the usual signal or countersign.

Platt Smith says it was usual to pass without any such ceremony. When that witness was called, he said he passed all except one. When they saw that they were people who lived in the neighborhood, they did not challenge him.

If there had been a large army on the island, it might have been different. But here was an army of two or three thousand men, and only two or three hundred upon the island, whom the Canadians feared no more than they would so many persons without arms at all.

But we have direct evidence that the sentinels were in the habit of challenging persons who passed. They were set there to do this duty. And unless this man has an all-seeing eye, to look anywhere, and everywhere, his testimony amounts to little or nothing.

We now approach a more important part of the prisoner's defense—the depositions. A commission is made up here at home, by the respectable counsel, to examine witnesses in behalf of the prisoner. In making up these questions, the counsel on the part of the prisoner makes out the ordinary questions, called interrogatories; and the counsel on the other side make out the proper cross-interrogatories; and they are sent to Canada, or wherever the witness resides, and these inter-

rogatories are read over, and the answers of the witness taken down. Now, you perceive, you cannot change your cross-questions to meet any other thing which the witness holds out, but have to examine him on the old questions. Of course, therefore, the witnesses can screen themselves from saying many things, that the counsel would think proper to inquire about, were the witness on the stand. Why, suppose that the learned counsel had been required, in any manner, to draw up written interrogatories for the witnesses, he has examined—how much would he have found out? Very little. You cannot go into a cross-examination, where depositions are taken, that shall elicit important facts, many of which would otherwise be brought to light. I grant that the testimony, on the part of the party issuing the commissions, may not be as forcible, yet the cross-questioning of the testimony amounts to little or nothing. In these commissions, do you find the question put, who were on board these boats? You do not. If the witnesses were on the stand, they would have to answer, who were there; this matter was of the utmost importance. Suppose you should come forward in a court of justice, and swear that you did not see the Attorney-General on board such a boat, that night; on the cross-examination, you would be asked, how many were there—who were there. If the witness could give in the names of all on board and say that he knew them, and give their number, and all these marks which make the truth, what would be the effect? To carry strength, and force, with such answers. Now what is done, in this manner of testimony? You find witness after witness swearing not only strongly, but positively, that the prisoner was not on board the boats, at all, when it is utterly impossible, positively to know whether McLeod was on board or not—utterly impossible; it is true, they might know he was not on board the boat where they were; but, to know that he was not on any of them, is utterly impossible.

Mr. Spencer. They have not said that; but the witnesses on board each boat—have declared that he was not on board the boat which they were in.

Mr. Jenkins. That is not very important; if they desired to show with certainty that the prisoner was not on board the boat, they should have asked the question, themselves; it would brace up the residue of the testimony beyond all description; every man would see if they knew those on board and could describe them, that McLeod was not among them; and their testimony could be relied on; but let them put the naked question only, and it shows that these persons could not be satisfied with a degree of certainty.

Mr. Spencer. The question is put and answered, whether they knew every man on board the boat.

Mr. Jenkins. But if the answer was made that they knew the names of all on board, would it not add to the testimony? If they could say, "I knew all on board, and McLeod was not there"—does it not amount to nothing at last? And, I will show you that the remarks are strictly applicable to the position I am about to take. The learned counsel did anticipate me—in saying that it would be urged by the counsel on the part of the People, that the parties to a crime, are not such as can be relied on in a court of justice, and I do admit, I was pained with the praise, which the distinguished counsel thought proper to attach to the transaction of these persons in this dark tragedy. Will the persons who are engaged in this business, be left to the tender mercies of those who, in the night time, invade our borders and attack in this manner our boats? When they know not who are on board—how many private citizens—who go and raise a gang of men, putting into their hands the most dangerous weapons, who cry out that they will "give no quarters," who shot one man on the spot, and how many others they killed, no man can tell; and after they had done all that, the learned counsel compares them with the heroes of the American Revolution. This is elevating them to a position to which the human mind can never give its assent! Shall those who commit an act of which they are ashamed, be thus praised, and in an American court? It is to me, absolutely and exceedingly unpleasant. Did they not know they were crossing the important line that divides two nations jealous of each other? Did they

know when they were about to commit murder, how many fathers they would render childless, and how many wives widows? Not at all; and yet they were willing to go and fire indiscriminately on that boat. Now, I say, a man who will do this is as hardened a villain as ever swung on the gallows; they went and raised the murderous knife in the night time, with a view of slaughtering those people indiscriminately, and without any cause whatever; and yet, it is claimed, although they possessed feelings thus hardened—it is said by the learned counsel opposite me, that you are to believe them, as much as though they had not been parties to the crime; it is hard work, and never, in this country or in England where common sense prevails, can it be assented to. Depend on it, the man who has participated in such a transaction, has lost his moral sense, and will be more easily swerved from the truth, than the man who is not thus stained with the commission of an evil deed; and, gentlemen, I would prove this, in the very witnesses themselves. The law on this subject is this—that a party to a crime, although he turn state's evidence, cannot alone support the prosecution for a criminal offense, without strong corroborative circumstances, for the purpose of enabling a court to authorize a jury to bring in a verdict of "guilty" against the prisoner. But if this testimony is of itself entitled to but loose credence, witnesses have been called against them; and I therefore insist that the testimony of these men should be looked into with great care, whatever it might amount to, were it not thus circumstanced, by the fact of their connection in the guilt of the prisoner. I will take one example—and that is the boat in which the commandant Drew was himself; and the first question is this—it appears from the evidence of other witnesses, that Drew is in Canada; why is he not produced here? The man who must have known McLeod better than any other person—why is not the commandant of the boats—the man, too, who was in company with the prisoner that very afternoon, and in whose boat the prisoner would be likely to enter—why is he not on the stand, and required to testify? In this country everything was at the command of the pris-

oner, and persons from his own country came here to watch the trial; why was not Drew authorized in that way, and requested to give evidence, as to whether he saw the prisoner at all or not? Remember that the prisoner, under the advice of his able counsel here, and perhaps equally able counsel in the Provinces, would not have called on men who were able to swear against him. Gentlemen, depend on it, there is acute management in this case; that they have not called on him to testify; if he could have sworn that the prisoner was not there, he would have been the first man pitched upon, and would have been called as a witness; but he was not. The second in command, Harris—

Mr. Spencer. There was one other of the officers of the navy, who was in the boat together with Drew, who declined to testify, for the reason that he would not give any countenance, by giving testimony, to the right of trial before the courts of the States.

Mr. Jenkins. I presume the counsel has been so informed, and that is about as true as that the prisoner was not in the expedition, because he was at Morrison's; but I hope the learned counsel will not always be deceived with pretenses so slight and flimsy; to save a man's life, it is true, he would not be sworn—he would not commit perjury, and therefore was not sworn. Who have they sworn out of that boat? The first was Harris, who was second in command; he says there were nine in the boat he went in. Edward Zealand, who was in the same boat, says there were eight in it; now, where is the odd man? I suspect it was McLeod; there is a difference of one between them; and how will they reconcile it? At any rate, there is a contradiction; and where is the odd man? If they can swear with such certainty—one swearing that there were nine, and another that there were eight, in the boat, it seems to me that it goes somewhat to invalidate the force of their evidence. Put that in connection with the fact that Drew himself would not swear, and let us see whether, as an American jury, who are not placed below mankind in general for knowledge and good sense, cannot see that there existed a consciousness that McLeod was a sharer in this deed

of violence. Now, Harris says there was no man of the name of McLeod in the expedition—he knew every person—“I did not see every person who embarked.” “On their return home they went to their respective quarters; I had no acquaintance with McLeod; I believe I was the last person who left her.” Zealand says, when they came to get out, he jumped into the river; I do not know but it may be that he, and the prisoner, had drunk deeper than they should have done, and therefore were unable to perform their fiendish duty.

Now, we come to the point raised by the testimony of Center. He swears that he threw a couple of carcasses, one into the fore, and one into the after cabin, and then came away. I should like to know how they burned, after the boat and he himself were wet. No man pretends that this Harris ever put any such article into this boat, for the purpose of firing her; it is contradicted by the other facts sworn to. What is there further on this branch of the case? It is perfectly obvious, that when you look through the evidence, and examine it, with respect to these commissions, it amounts at best to very little. It would not be expected that they would be careful to notice who were there; giddy and excited as they were. If a list had been made of those who were there, and McLeod's name had been on it, they would have been the last to produce it, in a case of life and death. No such list was made. The people, when the temper of the times has cooled down, will hold up the perpetrators of this deed to the indignation of both nations. You perceive, then, that the evidence from the commission, and that of Sears, does not amount to much.

Now, how do they establish their *alibi*? On this point of the case, I shall not detain you long; I do not deem it necessary. I shall leave much pertaining to this case to your own recollection, and to the remarks of the Attorney-General. What is an *alibi*? It is to prove a man to be in another place, at the time charged. Have you not heard the learned counsel say that the question of time was the most difficult of all things to be remembered? So it is; and therefore the de-

fense of *alibi* set up in criminal prosecutions, is such as almost always is looked upon with suspicion. Why? Because the question of time, about which people must remember, is an important one. Now, for the purpose of showing that we cannot rely on Morrison's evidence, we have introduced the confession of McLeod, to ascertain a fact entirely inconsistent with the statement of the Morrisons, in which McLeod says that on Christmas eve, the 24th of December, he was in Buffalo, and the following day he returned to Chippewa, and there gave the intelligence with respect to the Caroline. Now, Morrison swore with equal certainty that on that very evening this same McLeod was at his house, and stayed all night.

Mr. Spehcer. No—but on Christmas evening.

The Attorney-General. No, Morrison himself corrected the statement, and said it was on Christmas eve; the Judge will find it so, by reference to his minutes.

Mr. Jenkins. I understand it so; when the question was asked what time he was there, he said Christmas eve; that is what I understood him to say; if it is wrong, you will correct it. If so, then, of course, the witnesses stand contradicted in one point, for the reason that they swore that they remembered as distinctly that the prisoner was there on the 24th of December, as on the 29th; what is their recollection, then, good for? It is good for nothing. Inglis in his deposition, states that he was a barkeeper in Toronto—that McLeod came there the 31st of December, 1837, and stayed there three days; McLeod says that he did go to Toronto on the 1st of January, 1838, and the next day was there; although they had been at the expense of examining Inglis, his testimony was not read at all, and it contradicted that of the whole Morrison family, with respect to his being there, the 1st and 2nd of January, 1838. The depositions of these Morrisons, taken on another occasion, have been read to you; what do they say? That McLeod came there with his horse, and that Morrison directed his son to put up the horse and supper it. The old man swears he knew nothing about the horse; his wife and daughter swear that they knew nothing at all about the horse, except from the boy; what has produced this

change? They would rather have it suspected that Morrison's family did not tell the truth, than that McLeod went there on horseback. In his deposition he says that he went on horseback himself; he says, "I got up about half past seven or eight o'clock, got my horse, mounted him, and went to Stamford in company with Press." In the examination before the Judge, he says he led the horse and rode in the wagon with Press. Press says he has no recollection about the horse. The gentleman says he reconciles it in this way—that McLeod hitched his horse behind the wagon, and Press never found it out at all; is that possible? Not at all; if they were bothered by leading the horse, remember that the feeble recollection of Press, who is brought here to press everything into service, would have remembered it as long as the fact of McLeod's being with him; it is not to be forgotten; but, there is something more improbable than that with respect to this. Press is brought to fortify Morrison; and when you come to ascertain the fact, Press' and Caswell's testimony goes for less than nothing, in support of the testimony of this family. That it is not true in fact, is manifest. Press believes he went down to Chippewa, and at the door of Davis' tavern saw the prisoner; thinks he mentioned to the prisoner that he was in a hurry. McLeod had a horse at Davis', and still, in a muddy state of the roads and darkness of night, he detains Press from home, and takes a nap, while Press is waiting for him; it will do to tell this to new recruits, but not to us old soldiers. Do you suppose he got Press to wait for him to take a nap, and when he got to Morrison's he was so sleepy as to take another? It is preposterous; men of sense see through the flimsy maneuvering of which this is composed. The Morrisons say they usually go to bed at 8 or 9 o'clock; that night they were up till 12 o'clock; the old man remembers one thing—that McLeod took a glass of sling at 10 o'clock, but what they talked about, no man can tell! Why, gentlemen, it will not do to prove an *alibi* by such evidence as that They had heard that the Caroline was there, they say, before that time—

Mr. Spencer. None but the young lady entertained any thought of the Caroline's coming down, before.

Mr. Jenkins. My recollection is as I have stated it; you will remember whether it is true or not: the young lady says that in the afternoon of the 30th, McLeod returned to Chippewa, bringing a ball that had been fired at him from Navy Island: is it to be credited that any man would carry a cannon ball in his hands for the purpose of showing it to the young ladies! Gentlemen, it is not so. A little farther back, and let us see how this *alibi* is introduced. The Caroline was burned on the 29th of December; Cameron is shown to have been along there early in the morning; and that he brought along a piece of this ill-fated vessel—so anxious was Cameron to keep a piece of a vessel that had gone over the falls; that might all have been; yet it was quite early in the morning that Cameron should get hold of it; it is not very probable that he would have got hold of it, and taken it down to Morrison so early in the morning. If Morrison had sawed off a piece, Cameron would have remembered the special anxiety of a man to obtain a little piece of wood; and he would have been the last one of whom they would have forgotten to ask this question—what does he say? That on the morning after the burning of the Caroline, about nine o'clock, he stopped at John Morrison's gate, in front of the house near Stamford, and that Morrison came to the gate; "I there had a conversation with him of about five minutes; I may have mentioned the destruction of the Caroline to him; I now remember the facts of having held a conversation with Morrison at that time." Now, if that man had taken the pains to secure such an article as this, and the old soldier, Morrison, pleased with it, had thought proper to saw it off, Cameron could have remembered it. I ask if it does not look as if this *alibi* was manufactured? I regard this defense as made up for the occasion. It is possible, and barely possible, that it is true; but I regard it as made up for the occasion; and all the circumstances, to which I have alluded, show distinctly and positively that it is false; but when you place to

it, the opposite testimony, it solves all these difficulties. What man can say that the force of the testimony of the four Morrisons, and the other testimony to sustain them, can ever weigh at all, against any witness positively showing that on this occasion, the prisoner was on the ground?

I do not feel very much enlisted in this cause; I believe the prisoner is guilty; if he be, and it clearly appears so, remember not only this country, but England herself, holds you responsible, under the exaction of a juror's oath, in the presence of God, and the face of man, to pronounce him guilty. Should motives of policy be brought into the jury box? No; look through the case, examine it faithfully, and if you are not convinced that the prisoner was one of those persons on the expedition, I feel confident that you will acquit him. "I feel no apprehensions of his conviction," says the learned gentleman for the prisoner, and yet adds, if there be a doubt in your minds, acquit him; so say I. But the door of doubt should be shut up till every effort is made for the purpose of direct conclusion; it is only in cases where the mind cannot come to a conclusion, that there is room for doubt; but begin with doubt, and so treacherous is the mind, that it will continue to doubt—doubt, doubt, and never come to a conclusion. I ask you to take up this testimony, and view it with all the powers of mind you have; the people will see this testimony, and when the verdict is pronounced, it will be such as we can look into; then we can say whether it has been decided according to justice, though perhaps it might have been more politic, to have decided it against the force of evidence.

THE ATTORNEY-GENERAL FOR THE PEOPLE.

Mr. Hall. May it please the Court and Gentlemen of the Jury: Worn down with the labors of this case, I am called upon at this late hour to bear up, not against the intrinsic merits of the case, but against the powerful eloquence and the great personal influence of the counsel for the prisoner—to bear up this case under my own fatigue, and exhausted as you are by this trial, which has been of so great extent,

against false issues, which the ingenuity of counsel has been too successful in placing before you. During the progress of this case, and the summing up, counsel for the prisoner have complained loudly of the manner in which the prosecution has been conducted, as if there had been something harsh and improper on the part of those whose duty it was to conduct it before you. We have been accused of concealing from him the names of the witnesses. Gentlemen, I do not feel that the charge is properly brought against us. For one, I can say it is not properly brought against me. As to harshness in the case, I owe it to the position which I hold to say, from the outset—from the first moment that the prisoner at the bar was arrested at Lewiston, to the present moment in which I am addressing you, by the direction of the Executive of your State, as well as of those in whose more immediate hands the prosecution was, every attention has been given to the prisoner, and there has not been left the shadow of a shade of ground for the enemies of our State, here or elsewhere, to charge us with having tarnished the name of the State of New York, in the administration of justice to the prisoner at the bar. Our indulgence has been unprecedented to the prisoner, lest perchance an opportunity should be afforded to the ill-disposed to say that the State of New York has been pursuing the prisoner in a spirit of malignity. It was above all things resolved, that in the administration of your laws, "all things should be done in honor; naught in malice." It has also been said there has been a committee room in which these depositions on the part of the prisoner have been read to the witnesses who were to come here to refute them. Gentlemen of the jury, believe it not. It is utterly untrue. There has been no such committee or committee room. All the material witnesses for the prosecution have long since, on previous examinations, before the depositions were returned from Canada, or the commissions issued, stated the same facts, substantially, as they have stated them here. On what ground are you to be induced to believe that all this array of witnesses has been tampered with, or that there is some mysterious power extending behind the Court,

driving forward this prosecution—and for what? No adequate motive has been presented here. Gentlemen, believe me, it is not so. The same heated imagination which conjured up conspiracies to murder McLeod in jail, and next to blow up your courthouse, and other monstrous fancies—the same heated imagination has conjured this up also. I mean not to censure the counsel who have conducted the defense of the prisoner. Far be it from me to do so; they stand in a situation of great responsibility, and they have done their utmost. Gentlemen, if they had done less, I should have despised them for being recreant to their duty. I pardon faults which arise in the excess of zeal; and if you have discovered in me any pushing of a point beyond what is right and proper, attribute it to my zeal; for I have thought I have been doing my duty, and nothing more. Gentlemen—one word more before we pass to the merits of this case. Something has been said here of the mob at Lockport. I would not have mentioned this, but that it has been trumpeted forth that in this State we are so wild and regardless of law that we are ready to assassinate a Judge on the bench. I stand not here to apologize for any appearance of violence at Lockport, but the circumstances were not as they have been exaggerated here this day, and as they have been represented in the public prints both here and in Europe. Gentlemen—the prisoner was, by a Judge, let to bail without a precedent; and the people who were somewhat indignant at the outrage which had been committed at their very thresholds, were excited. They did not do violence to any one; they insisted that those who had become bound should cancel their bond, and that was the whole. The Judge cancelled no decision made; the individuals bound cancelled their bond and the mob, as it has been called, retired. And why this? It was because they relied on you. It was not that they wanted to destroy the prisoner, but they wished the prisoner to have a trial by jury. It was the confidence which they had in a trial by jury, and I pray God they may always have it. It was their confidence in the trial by jury that induced them to retire like good citizens, and allow the simple course of jus-

tice to be pursued. Now, gentlemen, what progress have we made in this case? May I say that we have proved that the Caroline was destroyed, and that Durfee was murdered? I confess, when the counsel for the prisoner attacked so violently the testimony of Mr. Wells—the honest Mr. Wells, the first witness who was called to prove the destruction of the Caroline—I began to be alarmed lest we had not proved that the Caroline was destroyed, and that Durfee was murdered. I was astonished at the unprovoked assault—the savage assault made on the witness, who, I doubt not, you are all satisfied is an honest man. He is, gentlemen, as honest a man as any in the State of New York. His testimony, as far as material to the case, went only to prove facts notoriously true; facts admitted to be true by the defense. The charge of perjury made against him must be considered a gratuitous if not a malignant libel, for which no pretext can be found in the character or testimony of the witness. Gentlemen, I do not think perjury is quite so common as the counsel seem to suppose; but, gentlemen, it is a common thing to swear a little more than the witnesses know; McNab, for example, in his testimony, as we will show hereafter, did not intend probably to swear to what he knew to be false, but only swore boldly and broadly to what it was impossible he could know to be true. When a witness is brought to swear in a favorite case which is near his heart, he does not always put in the words which qualify his testimony. But as to this open, deliberate perjury, in a case of life and death—it is monstrous and impossible! What man can stand here, and swear away the life of a human being and his cheek not blanch? It is incredible in itself. I shall not pause to demonstrate to you that the unfortunate Durfee is no more. You have his mangled body in your mind's eye, and you have seen the blood as it was described to you by the witnesses; you have seen that unfortunate, that inoffensive man, unconnected with any cause of offense against the Canadas, or any power whatever—his life taken in the darkness of the night, and his corpse thrown with indignity upon the wharf—our fellow-citizen, remember—one of those who are all bound to-

gether and to each other, to protect each and all, by laws which we have adopted for our government and guidance. We are bound to protect the life of every, the humblest citizen, as far as we have the power, and to revenge it when it is gone. The life of a man may be taken in lawful, self-defense, or in the necessary defense of one's country. Yes, gentlemen, it might be taken by one in the patriotic defense of his country. On that point I will go as far as the counsel for the prisoner.

But does the testimony here make out a lawful taking away of life in necessary defense? Gentlemen, it does not approach it. This point has been clearly discussed by the government at Washington, and I suppose the counsel for the prisoner will not dispute its authority. In the diplomatic correspondence which has taken place between the British Minister and our Secretary of State, our Secretary lays down the position that the affair of the *Caroline* was unjustifiable even in a national point of view, unless there was a strong necessity for instant self-defense, leaving no choice of means nor moment for deliberation, a necessity which the government of the United States could not believe to have existed. Gentlemen, this has been extolled as an act entitled to be ranked among the glorious achievements of men. You well recollect the description of this boat; it was a ferry boat—it was so small that a person could step out of a row boat on to her deck. Was it then so terrible an engine as would warrant such an extraordinary midnight expedition, violating the peaceful soil of a friendly nation and murdering its sleeping inhabitants? You will recollect that it came out from one witness that there were two steamboats lying at Chippewa, either of which might have met and destroyed her. Gentlemen, whatever other defense may be offered, this act cannot be justified as an act of self-defense. It was suggested by the prisoner's counsel that the persons on Navy Island might have been starved out by this act; but this plan, though it may have been a sagacious one, was one of barbarian cruelty—it was one which nothing but the rigor of war would justify—one which under no circumstances could

we be expected to favor or abet. If our citizens were there, on Navy Island, they were no longer our citizens, and if they had been butchered or hung, there could be no appeal to our laws; but when they remain within our own lines, God grant that we may always be able and willing to protect them. We are appealed to on behalf of this act in a manner which may affect some minds. It is that their country was invaded; and you are called upon and required to say, whether we should not have done the same, if lawless insurgents were operating against us in the same manner. At least, gentlemen of the jury, I should blush if any of my own countrymen would have done such an act in the night. If it should be necessary to destroy a little ferry boat, I trust there will be men to be found in the light of the sun to do the gallant deed, if it were such. It was done, too, gentlemen, as I stated in my opening, would probably appear, by an armed band of men from Chippewa. But it was not such an act of public force as would justify an individual engaged in it. I can add nothing to the able opinion of our Supreme Court, which I read to you in my opening. I can only say that Great Britain herself has decided that question, as far as the effect of an order of her government is concerned, when she refused to deliver up Greeley, when he was arrested at Madawaska, for taking the census under the order of the United States. When he was arrested for that act, and thrown into prison, and our government complained of the proceeding, what was the reply of the British Government?—"We cannot interfere—our laws must be respected." That answer, as far as the law went, was conclusive and our government acquiesced. The same answer is equally applicable and equally conclusive now, and the principle on which we acquiesced then, compels us to insist now. But so far as this was an act of war, that question has also been disposed of by Great Britain. When she seized our citizens taken on her shores, she tried them in her civil courts, and she condemned some to be executed and some to be banished. Yes, gentlemen, our citizens have been thus treated, and the wives and children and brothers of those men have kneeled to the gov-

ernment at Washington, again and again, imploring that something may be done to procure their release from foreign bondage; but they have been told that we could not interfere. Shall not, then, the same laws which bind us from interfering with those who trespass on their soil, be equally imperative and binding when the sides are turned, and their citizens trespass on our soil? During this discussion, gentlemen, your attention has been directed to some few instances, supposed to be analogous to this case. I will not detain you at this late hour, but I cannot allow an occasion of so much interest here and elsewhere, to pass without one word with reference to these instances, which are cited. We are reminded of the case of Florida; a protracted system of aggression and annoyance continued there for more than three years. At last General Jackson, compelled by the very extremity of necessity in the defense of our frontier, pursued the fugitive Indians beyond our boundary into the territory of a nation at peace with us. What was the result? Why as you all remember, gentlemen, the subject was brought before Congress and referred to committees of the Senate and of the House of Representatives. These committees, a majority of which were the personal and political friends of General Jackson, then covered with fresh laurels, the darling of the nation, were compelled in spite of their personal admiration of the man, to declare that the act was an unlawful aggression upon a friendly nation. Why then is the case so totally dissimilar in every particular, brought up as a precedent on this occasion?

Again, we are referred to the case of the Leopard and the Chesapeake. It is the very case I would select to prove the correctness of the decision of our Supreme Court. The commander of the Leopard made an unprovoked attack upon the Chesapeake in time of profound peace. Our government complained to Great Britain of the outrage, and demanded that the commander should be punished, and he was punished by being removed from his command. The learned counsel asks, with an air of triumph, "Could that man have been tried here?" Passed all question, had he been found

here, he could and would have been tried and punished here—else the demand upon England for his punishment would have been an absurdity. Else an offender in such cases should flee, not to his own country, but to the offended nation, where alone he is protected from punishment. In that case the British Government disavowed the act, in this it has not. Can the views of the British Government alter the nature of the act, or affect the power and jurisdiction of our Courts? Our Government declares it to be, not an act of war, but an act of lawless violence in time of peace. The British Government agrees it was not an act of war, but insists that it was an act of justifiable defense. The question of the lawfulness of the act, which is the point of difference between the two Governments, is one which belongs peculiarly to the judiciary; and if the executive opinions of either Government are to influence us, shall we not be controlled by the views of the Executive of our own Government, rather than by the groundless assumptions of the Executive of Great Britain?

Mr. Spencer. The British Government says that it was an exertion of force, defended by the circumstances, and declare that the orders given by the Provincial Government, received their sanction.

The Attorney-General. And when our Government admits the correctness of this assumption, it will be time enough for our courts to take notice of it. The United States have jurisdiction of this matter as an Executive, not a judicial power; the acts of the Executive are binding here; if tomorrow, at Washington, they make a treaty in which it is stipulated that the prisoner is to be delivered up, his chains fall from him. One word more; although I am conscious I am trespassing on your patience, permit me to say one word more before I leave this subject; for another opportunity may not occur to vindicate the course of our State. It is false that the authorities of New York have been delinquent in reference to these transactions; the authorities have done all they could. Governor Marcy issued his proclamation, he went personally, and it will be observed that the information of

the acts of the insurgents arrived at Albany about the 16th of December, and there was but scarcely a week before this catastrophe occurred. I stand boldly here and say that New York has done her duty, and her whole duty in this case; her Sheriffs, her District Attorneys, and her officers have done their whole duty. At the very time the event took place the excitement was almost quieted, and but for this foul and fatal deed, all would have gone off peacefully. There is not the shadow of a cause of complaint against the State, that she has not caused her laws to be executed, or against the United States that she has not been able and willing to fulfill, to the point of honor, all her obligations to her friend and ally.

Mr. Spencer. I take occasion to say that neither Mr. Bradley nor myself have said one single word, arraigning the United States Government or the Government of the State of New York, in this matter, for omission of duty, but have confined ourselves expressly to those participating in it.

October 12.

Mr. Hall. Gentlemen of the Jury: We have established that Amos Durfee was murdered; it now remains for us to show by whom this murder was committed, and whether by the prisoner who is charged with it. Let us first look into the circumstances which immediately preceded this transaction, and in this manner explain something of the position of the parties, and see if there arises a probability or improbability as to the prisoner's participation in that transaction. We have from him an account of himself the previous day; he tells us that the night before this he started from Chippewa to Niagara; he had proceeded as far as the Pavilion, when he was informed that the Caroline had come down, and although it was then night, he mounted his horse and went back to Chippewa with that important information; he goes to the headquarters of the commander-in-chief, Sir Allan McNab, and informed him that the Caroline had come down; the reply was that McNab could not act merely on her coming down. Act how? The subsequent catastrophe shows. He tells you that before daylight he furnishes a crew

of eight persons, and they went round Navy Island, to investigate, in order to furnish materials on which Sir Allan McNab could act; that he did not find the *Caroline* till two o'clock, when he found her coming down, and passing from the Island to Schlosser, and from Schlosser to the Island. What does he next do? We next discover him at 3 o'clock p. m., we find him, with closed doors, in consultation with Captain Drew, McNab and others. He had exposed his life to peril the night previous by shots from Navy Island; the great fact has now become developed, and the chiefs were assembled in counsel. You are told that this is very improbable, that they would be collected in a counting room or a store, to consult about matters of this kind. Under other circumstances, it would have been improbable; if the plot was some open and gallant act, you would have found them at headquarters, in their places consulting on the measures to be pursued; but it was an act of another kind—a midnight incendiarism; and they had met thus; it would not do to be collected in any other manner. It is in perfect keeping, and throws light and confirmation on the case in all its features. They were met in consultation, there, at 3 o'clock; and then and there was the design and the determination to destroy the *Caroline* fixed upon. You find the prisoner then retiring from his council to his bed; was it all then so quiet and peaceful? Had the great object been achieved, that all his cares should be thrown aside, and he quietly retire to rest? No; that was but to refresh his nature for a night's expedition to destroy the *Caroline*; all this is in keeping. If any man on the border would have engaged in it, it was that man; you find him busied about and consulting immediately before it was carried into execution; you find him on the spot equally busy after the return of the expedition. If we should go no further, governed by the laws of motive which regulate the conduct of men, we could all say that the individual would probably be found in this expedition; these facts alone establish a sort of presumption of it.

We next produce a witness from on board the *Caroline*,

who was there during this fatal and dastardly attack. We find one gentleman, who had seen him but a few days before, who knew his appearance as it then was—for men change in their appearance from year to year—and if you produce a witness who has seen an individual a year before, he may not be able to say it is the same man. We produce a witness who had seen him but a few days before; he says that when he opened the door of the companion way, to escape, he saw the prisoner, who made a thrust at him with a sword; it was but a moment, but he believed then, and had no doubt but it was the prisoner, so the next day, and the day after. This witness, you will recollect, was the captain of the boat—Captain Appleby; he was inquired of whether he would not swear that this was the individual; he says “no,” four years had passed; the circumstances under which the prisoner had lived and acted, had changed, and in human probability his appearance had changed. I might refer to the sickness and confinement of the prisoner having changed his appearance; but he swore at the time that he believed it was the prisoner. Up to this time, gentlemen, although the proof is such as would induce any of us to believe the prisoner was the man, unless it was shown to the contrary, yet it is not conclusive; the busy conspirator may have proved a coward at the pinch, and Captain Appleby may have been mistaken in his man.

I will now call your attention to the next class of evidence; the testimony of those witnesses who have heard the prisoner declare he was one of the marauders.

Eight witnesses have sworn before you, that they heard him declare at different times and places, that he was there and participated in the destruction of the *Caroline*. Can you disbelieve this testimony? It is impossible; the laws of your minds will not allow you to do it. The first witness is Corson, who on two different occasions—on the morning after and two or three days after, when he was standing on the shore with his spy glass, heard him make the expression, which is testified to by this witness. I will dwell a moment on this matter; a most virulent attack has been made on

Corson. This witness has been examined before us, and is well known to the counsel for the prisoner; it was known that he would be here; he was a neighbor of the counsel; will you tolerate that the counsel should come here, and by their own words denounce a witness, instead of bringing witnesses to impeach him, when they knew he would be here. They could not impeach him; not a more respectable man lives in the country, and if his character could be touched by an impeachment, the witnesses would have been brought forward, if there were any on earth; the importance of his testimony we all know. What has been done? A single expression in his testimony has been caught at and urged upon you as improbable. He was asked who was present when he heard the prisoner declare, the morning after, what he had done on board the *Caroline*. He answered "It seems to me at this moment, that Caswell was there, but I am not positive." On being further questioned, he said that Caswell was present, and that they had conversed on the subject that morning, and naturally told each other what they had seen and heard on the morning after the destruction of the *Caroline*. Now the prisoner's counsel says it is improbable that it should have occurred to the witness then for the first time, that Caswell was there. It must have occurred to him in the morning when they were talking together. Well, what then? The witness used a common form of expression, which is not to be taken literally, and which did not necessarily imply that it had never occurred to him before. Now is there anything in it, even if taken literally? Caswell did not tell witness that he saw him there, nor had any question arisen between them, whether they saw each other or were there at the same time. For the first time the question was put to the witness on the stand—"Who was there?" It is the first time his mind is turned to that point, and not improbable it did then first occur to him that Caswell was there. We are here surrounded by many people, some of whom you know. We go home, and the scene passes away, and none of you will task his mind to recollect who was here. Three years hence

you are placed upon the witness stand, and for the first time asked who was present here. You then go into your own mind; your imagination calls up the scene, and for a moment you seem to contemplate the picture again—and face after face again is seen, and among them there is some dim glimmering of a face that you know—it may be imagination and it may be fact. But then for the first time it occurs to you. Why? Because then for the first time the question is put to you. There is nothing remarkable or inconsistent with our experience in supposing that it should for the first time have occurred to the witness that he saw the face of his acquaintance, Caswell, when on the stand the question was for the first time put to him.

This is the only objection which the ingenious counsel has been able to discover in the testimony of Corson. And on such contemptibly frivolous matter has he ventured, in his desperate zeal, to charge a well-known and respectable citizen with wilful perjury.

But, gentlemen, if this unimpeached witness is to be believed, he establishes, not only that the prisoner on two occasions, in the presence of numerous persons, boasted that he was one of the destroyers of the *Caroline*, but also the all-important facts that the prisoner was not at Morrison's at sunrise the next morning, but at Davis' tavern in Chippewa.

The next witness, to whom I will call your attention, on this point of the declaration of the prisoner that he was there, is Parke. He says a day or two after the destruction of the *Caroline* he heard the subject discussed in the officer's mess room, and McLeod was there, and made the declaration that he participated in the destruction of that boat. I will not stop now to comment on his testimony, but defer it till I come to where it is more material. It appears from the testimony of Davis and Parke that there were two barkeepers, Johnson and Parke; it was a busy time then; twenty-five hundred soldiers were there. You can easily perceive how in these circumstances any of our country villages would be overrun by a body of twenty-five hundred men. This was

the case at Chippewa; the taverns were full, everybody was put in requisition about them, and they were open night and day. Parke says he retired to bed at 11 o'clock, and Johnson was up during the remainder of the night. I have shown to you that every effort has been made to procure the attendance of the barkeeper at this trial. He lives in another State, and I am not authorized to compel him to come, or pay him any further than his expenses. But it is not so with the prisoner; our law gives him the power to issue a commission and take testimony everywhere; it gives no such power to the prosecutor; I cannot do it; he can; where then is the testimony of this barkeeper? This is not a new thing; the counsel well knew the importance of the testimony of Johnson, if they wished to contradict the testimony of other witnesses. Why did they not get Johnson to show the transactions of that night at Davis' tavern? The next witness who testifies to the prisoner's declaration is Henry Myers; he was the one who in moving from Canada with his family had so much difficulty in finding his way across the river. He tells you that while at Niagara baiting his horse, there was a crowd of persons assembled together, some of them dressed in military habiliments, and were carousing in the tavern, and drinking there together; that McLeod was among them, and he testifies to some expressions there used by McLeod.

The learned counsel supposes, because the prisoner could not well have done all that he boasted of, while brandishing his pistol and his bloody sword, and attempting to astonish the Canadian militia in a barroom, that therefore our witness is discredited. Not so. We do not pretend that all the prisoner has said is true; his statements here in evidence prove the contrary. His improbable boast may discredit himself, but not the witness who heard him make them.

The counsel also urges you to disregard the testimony of this witness, because the expressions sworn to by him are unusual. If you knew the prisoner you might pretend to judge whether such expressions were usual with him, and might

probably issue from his mouth; but without such knowledge you can only judge from the unimpeached testimony of the witness; you can see only by his eyes, and hear only by his ears.

You are told that this witness is stupid, that he has not sense enough to keep the highway. It may be so. But remember that the counsel also told you that all the witnesses for the prosecution had combined and conspired together to invent a tale of falsehood in order to procure the conviction of the prisoner. Are stupid men selected to act a part in so intricate and complex a game, when a single mistake or inconsistency would baffle the design and expose the conspiracy? A stupid man may tell the truth as well as a wise man; but can he give to falsehood the circumstance and color of truth, and escape undetected from the searching cross-examination of the ingenious and powerful advocate? The very stupidity of this witness refutes the charge of conspiracy and perjury so unscrupulously made by the counsel for the prisoner. This witness has told you no invented tale. He has told you what he heard and saw.

The next witness is Calvin Wilson. He was ferry-keeper at Niagara; he tells you that he met McLeod with a group of persons; he thinks one of them was Raincock, that had been a deputy collector. You recollect what was said at that time; witnesses have been brought before you to show that Raincock had left the country at that time. This impeaches the witness. It is no part of my business to wish you to receive any testimony that is not beyond impeachment; the witness is so much impeached that I would not place any great reliance on what he says. The possibility is, that he was mistaken—that he did not see Raincock; and it is possible that the witnesses on the other side were mistaken. It is by no means established that this man, Raincock, was not there; but the evidence before you is such as to warrant you in doubting whether much reliance is to be placed on this witness, and I therefore lay him aside, and will not insist on his testimony. The next witness is William H. Caswell, who

heard him make the same declaration, near Davis' tavern, at an early hour the next morning. You will call to your recollection the person—his manner and deportment were those of an intelligent man—there was no air of eagerness, no disposition to make out a strong case before the jury, and for that matter I appeal to you, if every witness brought before you has not shown rather a reluctance than an over zeal. Have they been hasty? Have they declared in sweeping language that they knew this and that? Have they not rather had the information drawn from them, fact by fact, and circumstance by circumstance? And I might turn and ask you, if it has not been manifest that the witnesses on the other side—not to speak of the depositions—have been interested? Have they not been zealous in the cause? Have you not noticed that the witnesses would go on and insist in telling more than they were asked, whether it was testimony or not? Again, in reference to this witness, Caswell, who stands before you perfectly unimpeached; he was a witness who testified originally at the arrest before Justice Bell, in the presence of the counsel for the prisoner. I am mistaken, I understand, in saying that the counsel was present; but the statement made out at the time, the counsel have long since had copies of; and the same story here on the stand, and which we are assured was made up in a committee room to refute the Canadian depositions, is a story told a year ago. It is nearer the truth to say that the Canadian depositions were made up to refute Caswell and others, who testified long ago before Bell and Bowen, and whose depositions were made public. This man lives in the neighborhood of the counsel; his character is well known, and if liable to be impeached, the witnesses for this purpose would have been produced before you. You have seen the vigilance with which these witnesses have been sought; they have had time to send to Pennsylvania, to Ontario, for impeaching witnesses. There has been no want of information in the matter, and they have procured in every instance, when it was possible, the men to impeach the witnesses brought on the

part of the people. One thing more, which occurs to me now; it was intimated here with reference to this Caswell, that having made his statement he came here and was compelled to go over the same thing again.

Gentlemen, I make a remark here, and wish you to remember it, when I come to the commissions. The witnesses produced on the part of the prisoner, in almost every instance, have made affidavits, which were published in Canada, when the Governor wished to make out as strong a case as he could; then these men came forward, and have been brought up again with their old affidavits before them, and compelled in this cause to follow out what they, under the heat of the moment and the orders of loyalty, were induced to say. The next witness is Anson D. Quinby, who heard him also, about sunrise the next morning near Davis' tavern, make similar declarations of his bloody deeds on board the *Caroline*. This witness has been attempted to be impeached in a formal and proper manner; but the attempt is an utter failure. One impeaching witness, Lott, whom none of us know any better than we do Quinby, tells you that he has come direct from the county court of the county of Pennsylvania where he and Quinby were witnesses on opposite sides and swore against each other. He comes here by another oath to support the first. He is not an impartial witness, to say nothing of his being an election officer and Quinby opposed to him in politics. Another witness was brought here to impeach Quinby, himself a lawyer, who was employed on the side against which Quinby swore; he, too, thought Quinby had sworn to what was not true; but the circumstances which I think, will weigh with you against all this, is that, during the trial, they made inquiry to see if they could impeach him at home, where all the parties were known, and abandoned it, because they saw it was in vain.

Mr. Spencer. I am very sorry to interrupt the Attorney-General; I think, however, he mistakes also the testimony of this man. I will here take occasion to state that no one

but McNab had given his testimony previous to these commissions; these men did not make affidavits.

The Attorney-General. Gentlemen, you have heard the testimony; I endeavor to state the testimony as I have heard it; and am unconscious of having deviated from the true testimony of these witnesses, Lott and Wetmore. Lott was a Justice, and sworn in that case on one side, and Quinby on the other. Wetmore said he was a lawyer; he made inquiry about impeaching him, but did not undertake to do so.

JUDGE GRIDLEY. He states also the reasons—because his associate counsel believed it too unimportant to justify the attempt.

The Attorney-General. You will recollect that this witness, Quinby, is far from home, and therefore it is an extraordinary case; if we had had time to procure sustaining witnesses, you might then draw some inference from our neglect; but the first which I heard of any attempt to impeach Quinby, was when the witnesses appeared here on the stand. I will refer to the next witness, Stevens—he stated some facts, but was so evidently mistaken, whether intentionally or otherwise, that I look on his testimony as so little to be regarded, that I will exclude it from my remarks, and such you will do—exclude it from your consideration. He is undoubtedly mistaken; the facts he states are inconsistent with those stated by witnesses on both sides. The next is Timothy Wheaton, who was the last witness before you, on the part of the prosecution. In the fall of 1838, he saw the prisoner at the ferry; had a conversation with him; inquired of him about the Patriots; the prisoner goes on to tell him, among other things, that he was one who participated in the destruction of the Caroline. This witness is positive; it has not been attempted to impeach him, except by the gentleman's criticism on etiquette, who says that the witness testified that McLeod spoke to him, and none but a Yankee would address a person with whom he was unacquainted. This might be, if it were a fact; but he said that he spoke to McLeod first, and I believe that, according to the rules of eti-

quette, a gentleman, when spoken to civilly, will reply, and that was the case here; and perhaps Wheaton was a Yankee; I think he was—he was a stranger there, and very naturally introduced the subject by saying, “I pity those poor fellows!” He then goes on to inquire about other transactions, and the prisoner answers him on those points, and tells him what took place at Navy Island and at Schlosser. Is there anything improbable in this? Not one word; it is in the highest degree consistent, reasonable and probable. And here gentlemen, let me make one remark, which may be of some assistance to you, and throw light on the whole argument of the learned counsel for the prisoner. He has told you, and truly; and it was not necessary for him to tell you; it was discoverable—that he commenced the cause with the determination that every witness on the part of the People was a perjured villain; and he cross-examined them on that assumption, and has the assurance to ask you to do the same. I will ask you to take the other side, and assume for a moment, that the prisoner was there, and then take the testimony, and see if from beginning to end, it is not probable. If you view it in one point of view, assuming that he was not there, then turn round, and take the other assumption; but when you go into the jury room to decide, you must not take one hypothesis or the other; you are to arrive at your conclusion from the testimony, not to take the conclusion, and from that consider the testimony. Another witness, Seth Hinman, saw the prisoner early next morning near Davis’ tavern in Chippewa—a fact which utterly overthrows the *alibi* attempted to be proved by the Morrisons. This witness seems to have troubled the learned counsel much; he can find nothing against him; he comes to him, and raises his hands, and says, “Oh, the depths of iniquity!” It reminded me of an anecdote I have heard of Oliver Cromwell, who when he wished to get rid of his Parliament, went to one man and another, and charged them with derelictions here and there, and made various accusations, until at last he came to Sir Harry Vane, who was an upright man, against whom he

could bring no charge—he could only say, “Oh, Sir Harry Vane! Sir Harry Vane! the Lord deliver me from Sir Harry Vane!” (Laughter.)

JUDGE GRIDLEY. There is no reason whatever for any exhibition of this kind, nor will it be tolerated. There is nothing in the arguments of the counsel or proceedings that should create any disturbance of this character, and the scene is altogether unsuitable to a courtroom.

The Attorney-General. I will now call your attention to the testimony of Leonard Anson. No more intelligent man has appeared before you, on either side, whose matter and manner of testifying should entitle him to your credit. He was employed at Chippewa at the time. He has not been attempted to be impeached. He was a witness before Bell, a year ago. All that he says was well known. He lives, too, in Lockport, a neighbor of the learned counsel himself. And if anything could be said against him, you would have found them saying that he was not worthy of credit. But his character defies impeachment. They cannot impeach fit. He says he heard the declaration in the barroom, in the company of a large number of those who were present at the destruction of the *Caroline*. And the only way they have attempted to impeach him was, by the argument of the counsel, who misstates his testimony, and says that he testified that he was awake at the burning of the *Caroline*, and got up and went to Davis’ at the time. That is not his testimony. He states that he was awake at the time, but that he remained there, and did not go to Davis’ till morning. In order to make out the impeachment he is obliged to misstate the testimony.

Mr. Spencer. I think you are mistaken, if I have read my own minutes rightly, and they are true, I think there is no great misstatement of evidence.

JUDGE GRIDLEY. I think the counsel had better be allowed to proceed. If the counsel misstates the evidence the jury will correct it.

The Attorney-General. I hope, that your Honor also, will correct me if I do not truly state the evidence.

JUDGE GRIDLEY. I think your statement was correct.

The Attorney-General. Far be it from me to wish to convict any man with evidence that is untrue. I hope in truth that you can acquit the prisoner. All my duty is, to have the facts placed before you. Now I have commented on all the witnesses, and among them are some seven or eight, who stand unimpeached. And I ask you, as men, can you refuse to say that, whether the prisoner was or was not there, he has again and again declared, under various circumstances, that he was there? It is true that the declaration of the prisoner is not absolute evidence. The fact that he declares he has done so and so is not positive proof of it, and I do not thus bring it before you; although it seems most extraordinary, that on so many occasions, he should have made the declaration, if it was not so. But on one or more occasions he made the declaration in presence of those who were there. Mark the testimony of Leonard Anson. He said that he declared it, surrounded by those who were warm from the conflict. That he declared—"I did so and so;" and none of them disputed it. I ask you when he made the declaration in the presence of those persons, and they did not deny it, if it did not make every one of them a witness before you? Is not every man of them a witness before you, on the stand, that he was there? If you believe the testimony of Anson and others, who said that he made the declaration surrounded by these people, you must believe that he was there. Braggadocios do not select such a place for their boast. When, with their hands red with blood, a man comes among them, and says I was there, and did this and that, it must be so, gentlemen.

I will now proceed to the testimony of the witnesses who saw the prisoner embark in the boats. The first witness is Charles Parke. This is a Canadian witness. The gentlemen have undertaken to say that this witness contrived to get here. This is not so. He would not have been here had he

known of the trial. It is true that he came to Buffalo to purchase a library, for a library association—which very library he has purchased in this city—and was unexpectedly summoned as a witness, and supposed the subpoena a compulsory process, which he was bound to obey. Is there anything that should induce you to doubt his testimony? He knew McLeod. Was in the habit of seeing him almost every hour of the day. He was not like the witnesses on the part of the prisoner, who never saw him, or saw him but once. Here was a witness who was in the habit of seeing him morning, noon and night, under all circumstances, and who had seen him but one hour before—who had, therefore, seen him in the same habiliments in which he was at the embarkation, and he would have been less likely to have mistaken him? He went to the place of embarkation, and saw them embark, and saw the prisoner there, and there saw him get into one of those boats. Now, gentlemen, here is a witness who, if the prisoner was not present to take a part in the destruction of the *Caroline*, is a perjured man. That man, if the prisoner was not there, has come forward, deliberately and unblenchingly before you, and attempted, by perjury, to swear away the life of a man. To my mind the simple fact is more incredible than anything you are called on to believe in this cause. The counsel have urged on you, that this witness, Parke, is opposed to Press, and that he or Press is perjured. It is not so. Press' story is perfectly consistent with the fact that the prisoner was present. Mark that! Press states facts which may be all true; but he may be mistaken in time, which, the counsel tells you, is one of the things which are most easily mistaken. It may have been the day before or the day after. Not so with Parke. If his story be not true, there is no corner where he can shrink from damning perjury.

Gentlemen, let me advert to a very small circumstance. The learned counsel complains of Parke, because he did not resort to what he calls "white lying,"—to some evasive reply, which he might have done and got off; he says that he

might have told a "white lie" and avoided testifying in this matter, by saying that he knew nothing material to the cause. Why will not the learned counsel allow the same privilege to our witness, Drown? When he comes to Drown, who, when his family were sick, and he could not attend, said he did not know anything of consequence in the cause, when he comes to Drown, the lie is black enough. I wish the gentleman to be consistent, and if "white lies" may be used in one case, why not in another? Another objection made to the testimony of this witness is, that he said he did not know to whom he had ever told the story. "Now, how improbable," say they, "that is!" "How came he here?" Why, believing that this was true, we inquired who saw it, if true? and we found that Davis, Parke and Johnson, were men, of all others, who must be brought before you, and without stopping to inquire what they would state, we proceeded to get them here; we knew that Parke was present in the barroom, and must have seen the prisoner there; there was no necessity for him to divulge what he would testify to. We did not think it necessary to drill our witnesses but to send for those on the spot, who must have known of the transaction. This much for the testimony of a witness unimpeached, who says he saw these men get into the boats at the time of the embarkation. Now, let us proceed to a witness who saw them disembark; that is Samuel Drown. You have heard, gentlemen, an attempt to impeach this witness; you have heard the testimony of Bates; and also of Rev. John Marsh, who says he knew him several years in Canada; I can throw no more light on the subject. I look on his character as perfectly sustained; and I look upon the witness on the stand and the manner in which he has withstood the fearful cross-examination, as presenting him in an attitude which demands your belief; he is not a learned man—not a man of wealth and standing; but he appears before you in the attitude and manner of an honest and intelligent man. If he stands impeached at all, it is by Bates, and this I deny; for he tells you, that for the last four years, his

character has been unexceptionable. Rev. John Marsh says he has known and employed him for many years and never knew anything against his character. He has been attempted to be impeached by the comments of the learned counsel, who has said that he went down to see a sailor and did not speak to him. He did not say this; but that he went down to the beacon light; that while he stood there, he remarked to his companion that he wished to know who those persons were; and that he would run down and see them. He went from the high road to the path which passes some little distance along the river; and Smith kept along the road; Drown went down to the boats and saw the men; he went for the purpose of seeing them; out of that Yankee curiosity to know who the men were; and he tells you that the prisoner at the bar was there; he saw him; he knew him; was familiar with his face; was in the habit of seeing him at the time; was not only satisfied that McLeod was there, in the darkness, but went with the troop in the road to Davis' tavern, where the lights were shining, and saw him there in the light. He, too, like Parke, unless the prisoner was in that spot, is a perjured man; there is no escape from it; he is a black-hearted perjurer, unless the prisoner was there. He says he knows it was him—he is as sure of it as he is that he saw him sitting here. This, gentlemen, is the substance of the testimony on the part of the prosecution. The learned counsel for the defense asks, with an air of triumph, why were not more witnesses produced of those who were on board the boat? He tells you, besides, that there is a conspiracy to take away the life of the prisoner. If there be a conspiracy, would not the same thing have suggested itself to the conspirators? Could there not be found one reckless man among the conspirators to come forward and swear that he saw him in the boat? How comes it that such natural testimony had not suggested itself to these perjurers? It would have been perfectly easy for one of these conspiring perjurers to have declared himself on board the *Caroline*. No, gentlemen of the jury, the idea has its basis in the im-

agination of the learned counsel, only, that a number of men from different parts of the State, dragged to this stand by compulsion, to give evidence, should have previously concerted a plan to come here and swear away the life of an innocent man. It is a thing most improbable; you cannot believe it to be true. It is utterly inconsistent in itself, and altogether too improbable in its nature to obtain belief. A sweeping attack, gentlemen, has been made upon the witnesses on the part of the prosecution, that they were connected in some way, with the excitements which existed upon the frontier, and the contentions which were going on between the Canadian authorities and some of their citizens. It is true, some of them were involved in those difficulties. How far this is to go to affect their credit in this case, depends upon you, gentlemen. If you think that because they were witnessing these transactions, and partaking of the excitement which it was natural for them to feel; that therefore they are incompetent witnesses, I would ask you, on the other hand, whether those who testified on the other side, and who were also there, are not equally to be discredited? I ask you whether the fact of their being participators in those excitements, is to weigh against their positive testimony? If that testimony were respecting a question of quantity, quality, or degree, I grant you it would be objectionable; but when the question is as to an absolute fact, wholly disconnected with themselves, excited feelings furnish no ground of objection; when the question is merely whether they saw such things or not, the circumstance of excited feelings has no influence whatever.

Gentlemen, before I proceed to examine the evidence on the part of the defense, I wish to make one remark. The case made out on the part of the prosecution is one which, in point of strength, I have rarely seen surpassed. It is a rare thing that so much direct and positive testimony should have accumulated against the prisoner. This is a fact to which your minds must assent; and unless something be presented in opposition to this array of testimony which is physically

irreconcilable with it, your verdict must be against the prisoner. Now, what is the defense set up on the part of the prisoner? It is what is called in technical phraseology, an *alibi*; and its character has been best described by a pun on the word, making it a-lie-by. You, gentlemen, are not sufficiently acquainted, perhaps, with the practice of law to know, but it is a well-known circumstance in the profession, that the proving of an *alibi*, as a defense upon a criminal prosecution, is the common resort of all felons. It offers many advantages to the accused. He has first the power of selecting the place where he will locate himself; next he has the power of selecting his witnesses; he may make his accomplices his witnesses; and we are told by learned writers upon this subject, that often has it been known to be made the screen for successful villainy. He goes in reality to the place fixed upon; he has his witnesses present, and they come into court and testify according to what happened, but they fix upon a different time from that in which it really took place, and assign the particular and precise period of the act complained of, as that of which they speak. It is a matter easy to be established, and exceedingly difficult to be controverted. For this reason, it is, gentlemen, that there is another rule which applies to questions of this kind. If it is a mere approximation to truth, a mere probability that he was at the place in question, it weighs not one particle against the positive testimony of unimpeached witnesses. This is the law as applied to an *alibi*. Now, gentlemen, let us look at the evidence which has been taken in support of the defense. But first allow me to remark, the jury cannot but perceive the disadvantage which the counsel for the prosecution labor under in establishing their case. Witnesses who live in Canada are not within our power. Those who were engaged in the expedition will not testify against the prisoner. The only witnesses, therefore, within our reach, are those who were on board the *Caroline*, together with some who saw the prisoner embark, and others who saw him return from the expedition. It did so happen that there were some young builders who came over and es-

tablished themselves in business upon this side of the line, who were acquainted with the prisoner, and who knew of his participation in the expedition. And it is rather a matter of surprise that we have been able to produce so many witnesses. On the other hand, how is it with regard to the prisoner? All Canada are ready to come to the assistance of the prisoner: every man, woman and child of them. Such is the position in which we stand in making out our case. Such, gentlemen, is the character of the testimony which has been brought forward so vauntingly in these commissions. But you see not the men, you hear not their voices; you know not their manner; and the same reasons which have been urged on you, to discredit our witnesses, would apply with greater force with respect to these depositions. On paper, all men appear alike. You may take the most perjured villain, place him in the closet with his counsel, and his testimony, calmly and coolly prepared and written down, would appear as well as that of the most conscientious and upright man. There are other considerations, gentlemen, which I wish you to carry with you, when you consider this testimony. We have no opportunity for cross-examination. We cannot, of course, know what their answers will be to the interrogatories in chief, and the cross-interrogatories are, therefore, the most futile means of eliciting the truth imaginable. The witnesses, on the contrary, having the opportunity of reading over the cross-interrogatories, as well as those in chief, are enabled to frame their answers in that artful manner, which will meet the whole case. Again, whilst we have laws which very justly punish with imprisonment, witnesses who are guilty of perjury, these laws do not extend to those who make depositions in this manner in a foreign country. They swear with perfect impunity. Swear as they may, they go unscathed. We have no power over them. The depositions, therefore, are not entitled to more credit than mere voluntary statements, not taken under oath. There is another circumstance connected with these commissions, which I wish you to consider. It has been before

stated that there are many objections to these commissions, and among other things, that the names of new witnesses were inserted, from time to time, as they happened to be discovered; that in fact, it was essentially a roving commission, a scoop-net to draw up all that could be found in Canada, whether filth or not, and bring it into court and empty it here before you. You may have observed, and perhaps with a feeling of censure towards myself, that I have objected to the manner in which their answers have been framed, and the commissions executed; but, gentlemen, it was the only way in which I could protect my case from these irregularities, by pointing them out to your notice. The names of some of the witnesses we never knew until we saw the commissions produced here.

Mr. Spencer. This cannot be so, Mr. Attorney-General. All the names were inserted in the commissions, to which your colleague at all events was no stranger.

The Attorney-General. I only know that after cross-interrogatories were framed, the names of numerous witnesses which I had not before seen were added, and of whom I have reason to believe that the District-Attorney was also ignorant. At all events they were not persons for whom cross-interrogatories had been framed.

THE JUDGE. It is just to say, however, that the opposite counsel had entered into stipulations that this might be done.

The Attorney-General. The Court perhaps misapprehends the tenor of my observations. I only make this remark to show that we have had no opportunity of knowing what their witnesses would prove. There is another circumstance, which I should not do justice to myself, if I did not lay before you. The same person who took down the testimony acted also as agent in collecting testimony. Now, gentlemen, suppose this testimony to have been taken by the learned counsel for the prisoner, or by myself, is it not reasonable to suppose that we should give a certain degree of coloring to it? The variation might be apparently slight, yet it might alter the whole sense and meaning of the sentence. And that such

coloring would be given is only consistent with human nature. It is for this reason, that in a Court of Chancery, and in some other courts, depositions taken by the Clerk of either party would not be allowed to be read. Such is the disposition which every one feels to state the case in the strongest manner on his own side. And so does he feel a disposition also when he takes down the testimony of another, to give it all the coloring possible. Now, the object of this testimony is to establish the fact that the prisoner was not in the expedition. Let us see, in the first place, what we have a right to call upon the prisoner to show. First, I take it, we have a right to ask that he should bring forward persons who are acquainted with him—his associates—who are in the habit of being with him. And we have also a right to insist on a number of witnesses somewhat proportioned to those who were present upon the occasion in question. We should also require, inasmuch as the embarkation took place at different places, that there should be persons presented to us here who were at both those points. If they fail to do this, I think we may say that they have not made out a *prima facie* defense. It amounts not even to probability. As to the first point—that we are entitled to expect those persons to be produced as witnesses who are well acquainted with the prisoner—suppose a stranger came into this court; at a future day, you might swear the whole audience, and they would not say that they saw such a man, because they neither knew him nor recollected him. If, therefore, they have not produced persons who knew the prisoner well, and in numbers somewhat proportioned to the numbers present, they have not begun to make out a case—they have done nothing towards convincing your minds.

Now, let us see how the matter stands in this respect. They have produced the testimony of only two persons who were present at the embarkation, except those who went in the expedition, who testify to the absence of the prisoner; these are Captain Sears and Sir Allan McNab. Let us examine their testimony. I do not believe, gentlemen, that Captain

Sears perjured himself before you; I have not the least idea of the kind, but he did what others have done, and what biased witnesses almost always do, viz.: swear positively to what they only supposed to be true without having the means of knowing to any degree of certainty. This is the temptation to which they are exposed; and into this snare has Captain Sears fallen. He says he saw Davis that night; but Davis swears that he was not seen by any one, for he was not in the barroom, but in his own private room. I might point out various other discrepancies, but it is quite unnecessary, because I would in fact rather adduce the testimony of Captain Sears on behalf of the prosecution. Sears says he did not see Sir Allan MacNab; he did not see McDonald; out of five or six persons whom he said he knew, I named three or four, and to each one he answered, "I did not see him." Is it then wonderful that he did not see McLeod? Does this testimony advance the defense one iota? Does it in the slightest degree strengthen your belief that the prisoner was not there because he did not see him? Why, he did not see McNab, the commander-in-chief, who stood there, the cynosure of all eyes, the very head and front of the whole affair. Well, then, is it wonderful that he should not have seen McLeod? The other witness is Sir Allan MacNab himself. He says that he was there, and he did not see McLeod. Well, gentlemen, it is not very wonderful that he did not. He says that he was at Chippewa River, at the place of embarkation, and it appears from the whole scope of his testimony that he never did go up to the higher place of embarkation. What is his testimony worth, then? Suppose there are three doors to this court room, and Sir Allan McNab stands at one of them, and he swears that McLeod is not in the house, because he did not enter at the particular door where he stood.

But, gentlemen, although it may not be thought necessary to go further into the testimony of Sir Allan MacNab, still let us examine it a little further, not for the purpose of weakening that testimony, but rather to give you an idea of the whole mass. Now, who is this McNab? Why, although

he is of the peaceful profession of law, yet we find him in command of twenty-five hundred men, and what is a little remarkable, kept at bay by about two or three hundred. The only exploit of which we hear as having been achieved by the gallant knight and his gallant army, was the destruction of the steamboat *Caroline*. For this he received the honor of knighthood. Gentlemen, in ancient times, it was customary to reward the achievement of gallant deeds by conferring the honor of knighthood, together with a coat of arms, and a crest emblazoned, emblematic of the deed for which the mark of distinction was conferred. When McNab emblazons his crest, let him take no emblem of noble daring—no bloody hand—no shivered spear. No, the torch of the midnight incendiary would be the fittest emblem to commemorate the deed on which his glory rests. In the days of chivalry gallant knights often swore by their knighthood—in reading the testimony of McNab I confess I could not resist the impression that he was swearing for his knighthood. Gentlemen, Sir Allan McNab's statements, if examined, will be found to impeach themselves in various ways. In reply to the question, "how the men embarked, whether in military order or not, and whether they disembarked in the same order," he answers that the men came in a body, and went away in a body. Now, this testimony is in contradiction to that of many of their witnesses, who say that upon arriving at the place of embarkation they waited, some ten minutes, some fifteen, and some half an hour. So that if you take the testimony of the witnesses whom they themselves produce, the testimony of Sir Allan McNab is entirely destroyed. Some came there and went instantly into the boats—so that those standing about had no opportunity of knowing who were among them. McNab tells you he did not see McLeod, but McLeod, in his statement, says that he rode back to Chippewa, and went to McNab's quarters and told him the boat was coming down from Buffalo. The testimony of Sears says that although he had four or five friends there, he recognized only one or two of them; though he knew them well, he did not recog-

nize them; this is sufficient to satisfy you that in this declaration of McNab, he swears by virtue of his office; it is more like a command of what ought to be, than a statement of fact that is.

I will now call your attention to John Harris; he was the witness whom the commissioner had occasion to prompt a little; he told him what other witnesses had said. He, gentlemen, is the man whose testimony seems to indicate that he knew all about the affair—that he was first in it, and last out of it; he heard McNab give the orders, though McNab says they were given privately in the ear of Drew on the beach, and yet Harris heard it; he says he was the last man on the boat, when others say that the foolish old man could not keep on the boat, but fell overboard, and they took him up and wrapped him in a blanket. What does he know upon the subject in reference to the first great fact? He says he did not know McLeod—he had never spoken to him in his life—but for a day or two he had known him by sight. He had never seen him since. There is another thing which this witness states, and to which I beg to call your attention. John Harris says that a list of all the names was made out—that he saw it at the time, and has seen it since, that there is no mistake; that it presents the names of all the officers, and of every man on board. But where was it made out? At the place of debarkation, at midnight, without a light or a candle; such perfectly absurd falsehood would damn the reputation of any witness who would come before a jury and state it. You have listened to a statement respecting the disembarkation with the wounded man; and in the midst of that confusion some one could take out a scrivener's inkhorn, and make a list in midnight darkness. It is the maddest lie that ever was offered before a jury. And that is the kind of testimony they expect you to rely upon. It appears there are four lists: One is the list that McNab talks of; he thinks that a list was made out and returned. Another is spoken of by Hector, made out at Kirkpatrick's tavern, where they had been carousing all night; and at 6 o'clock in the morn-

ing, they undertake to make out a list. Another is the list which McCormack had; he says he was the deputy who was engaged in going about to gather up volunteers, and he made a list. How perfectly impossible it must have been to have a perfect list at that time, while going about to pick up volunteers for it; it seems that they had not been previously embodied, but were picked up all along shore, till the moment of embarkation. How could they know who was upon one boat and who upon another? It was all confusion; no man knew, no man could know, who was in the expedition at that time. So much for these boasted lists which have been spoken of. And how much, gentlemen, they talk of these lists, as if they were official papers, regularly drawn up and signed. Can you bring yourselves to believe, for one moment, that if a list had ever been thus made out, it would not have been produced here? That the whole nation should be agitated, even to the throne, for the purpose of releasing a prisoner, and not bring forward that list? For if they had brought an official document, made out by McNab, sent to the Governor, and filed in the archives of the government, I would not press a conviction. I would look upon it as a strong evidence that he was not there. Before you can give the least credit to this statement, you must be informed where that list was made out, by whom, and how made out; whether it was the mere random guess of some one of those engaged in the expedition, who knew but little about it, or whether it was an authentic and official document. If such an one was made out, why is it not here? They say because they are not willing to expose the persons who were there; but I think this was an evasion. There may have been two or three or four or five engaged in that expedition who are not known; beyond that number they are known. It is not, then, for concealment that this list is kept back. Let me now state the result of a little looking into these commissions. One of the interrogations was framed to ascertain the number. Let us see if any two of them agree in the number of men engaged in the expedition. It would have been very difficult to make out a perfect list.

Captain Beer says that sixty-five embarked; Light says sixty; McCormick says fifty; Cleverly says forty; Gordon says forty-five; O'Reilly says fifty; Hector says fifty-six; Zealand says from fifty to sixty; McNab says forty; Harris says fifty-three, of whom forty-one, neither more nor less, reached the Caroline. There are no two of these witnesses agreeing as to the number of men in the expedition. Now, gentlemen, we will take up the examination of those who went on the boats. They do not pretend to know any except those who went on their boats, that is the boat upon which the witness went.

To the 15th cross-interrogatory, "Did you know all who embarked in the expedition? Did you see the face of and recognize each one who went in the expedition?" *Neil McGregor* says: "I accompanied the expedition. J. P. Battersby commanded the boat I went in. I forget who commanded the other boats. I believe seven boats started, and five reached the Caroline. I believe he was not in the boat that I was in, or in any other. I did not see him." *Armour* says: "I did not know all the persons that went on the expedition—though I did know about half of them. I did see most of the faces of those that were on the expedition, and I recognized a greater part of them." *Light* says: "I did not know all who embarked in the expedition—I did not see nor recognize the face of each one." *McCormick* says: "I did not know all who embarked on the expedition, nor did I see and recognize the face of each one." *Cleverly* says: "I did not know all; I knew most of them. I saw all the men that embarked, but I cannot say that I recognized the features of each one." *Gordon* says: "I did not." *O'Reilly* says: "I was personally acquainted with all of them, or nearly all—I cannot swear that I recognized the face of each one that went on the expedition." *Battersby* says: "I did not know all who embarked in the expedition—I did not see the face of each one that went on the expedition." *Zealand* says: "I did not know or recognize all who were in the expedition." *Hector* says: "I did not know all, nor did I see

the faces of all." *McNab* says: "I think I know all who embarked on the expedition. I saw the faces of most of them, and recognized those whom I saw." *Harris* says: "I have already stated that many I knew well, some I knew by sight, and others I did not know. I saw the whole of them, but cannot say that I saw all their faces, or recognized the whole of them." *Christopher Beer* says: "I did not know all, or recognize the face of each one who went on the expedition."

Thus much, gentlemen, for the knowledge of those men at the point of embarkation. They can say nothing about it to show, that fifty or a hundred McLeods might not have been there, and they not have seen or recognized them.

The point upon which most stress is laid by the counsel for the prisoner is, that there are witnesses from each one of these boats, and that they did not see him. If that be so, it will go a great way, if you believe there was no opportunity for any one to go without their seeing and knowing it. It will have great weight with you in relation to the question, whether he was there or not. In the first place, gentlemen, they do not pretend that they knew all. I refer you to the answers to the sixteenth interrogatory. To this Robert Armour says: "I knew all but two, and these two were strangers to me."

Light says that he did know all; that he had raised the boats' crews, but having no personal acquaintance with them, he cannot say that he recognized each one of those who were in his own boat. Zealand says he was not personally acquainted with all who went in the same boat with him. He did not recognize each one, or speak to each one of them. He testified that he had been introduced to McLeod and knew him. In his answer, he says: "I have known McLeod. I was not acquainted with him in 1837. I knew his person by sight, but did not know his name until 1838." And in a subsequent answer, this same Zealand states that he and McLeod were out the night before upon a secret expedition. He speaks with great hesitation about McLeod's being in the boat with him on that occasion, and

I show this by way of illustration, that you may see how uncertain is their testimony. He says: "I went in a boat round Navy Island; a person was in that boat, who I think was McLeod, but I am not certain;" this does not come out on the direct question, but upon the cross-interrogatories.

Here is one of these witnesses who says that he went round Navy Island the night before, in the same boat with McLeod, and McLeod says it was in the morning when they returned; and if the witness could not be certain in relation to this fact, how could he as to others?

There is another circumstance to show how little these statements are to be depended on. To the seventeenth interrogatory, "Did the same persons return with you in your boat as embarked with you?" I have collated the answers, and find that five boats reached the Caroline. Captain Beer says that those who went in his boat came back in it. Others say that the same came back, with certain exception. From these statements, it would appear that four boats brought back the same number of persons that they carried out, and nine more. This leaves one boat unaccounted for. McCormick says that there were eight in his boat. Here we find that four boats brought back one man more than they all carried out, which shows that there can be no substantial reliance placed upon them, as to the facts. In this dark night two of these witnesses, Light and Armour, who were in the same boat, give different statements. Light says that all who went out with him returned with him; Armour swears that all who went in their boat returned in the same, and yet Light, did not return in it. Again, Harris and Zealand embarked in the same boat, commanded by Drew, the leader of the expedition—and Harris said that all returned in the boat that went out in her. But Zealand says that Drew did not return in his own boat, but came back in another. Is there, then, any reliance to be placed upon their statements as to who were, and who were not, in the boats, except in a very general sense? I might call your attention to the fact of their recognizing each other on the Caroline. The fact

is, they met and fought each other—which is pretty conclusive proof that they did not recognize each other there.

I wish to call your attention to this matter, in another point of view. It seems that the number embarked was about sixty, of whom twelve are called to give testimony before you; that is, one in five. In such an expedition, and on such a night, it would be more wonderful if you could not find twelve out of sixty, than it would to find twelve who could swear they did not see or recognize particular individuals. Let us see what they did know. Their answers to the first interrogatory gives the following result. Three out of the twelve say they did not know McLeod at all; six of them say they had no personal acquaintance with him, but had merely seen him. One says he had been introduced to him. Two only say that they had known him for some time. Only two out of the twelve knew him intimately!

Remember, they could have examined all Canada, if they chose. They had a commission with them which enabled them to examine any and every man; and you have a right to presume that, out of the whole sixty, but twelve could be found who could swear that they did not see him. Three of these did not know him at all, and six knew him but slightly.

Well, gentlemen, there is another consideration with reference to this subject, and we will then leave this branch of the testimony.

All these witnesses, I believe, without exception have sworn that they were resisted on the boat; that they were fired at. I suppose I need not say one word upon this subject. I presume that you, and the Court, are perfectly satisfied that there was no resistance—that no gun was fired—that those who were upon the boat were unarmed and helpless, and fled for their lives; and yet almost every one of these witnesses has sworn that they were resisted by those on the boat. I was astonished when I read it; and the expression occurred to me which Sterne has put into the mouth of my uncle Toby—"Our army swore terribly in Flanders"—but they swore worse in Canada.

I do not believe that respectable men would come forward, and deliberately perjure themselves; but it is very certain that they swore broadly and carelessly upon the side on which their feelings were enlisted.

Now, gentlemen, if you will pardon me for being so tedious, in relation to this evidence, which was not given to you upon the stand, and which I have thought it necessary to sift a little, in summing it up before you—I will ask you next to go with me in one or two of these boats.

With reference to this subject, some of the witnesses say that seven boats' crews embarked; that five reached the *Caroline* and participated in the conflict. *Armour* says that three, only, reached the *Caroline*. *Hector* says that nine boats left. *Light* says that seven or nine left the shore, which corroborates *Drown*; that is, their own witness corroborates our witness. *Light* also says that four of these boats reached the *Caroline*, and that no boat returned in company with the boat in which he was; but *Sears* says that five boats returned together. *Battersby* was in one of the boats that failed, and he says that his boat and one other that failed, returned about midnight. Others state that they came back at a little after daylight, notwithstanding that those who commanded them have sworn that both returned together about midnight. How can you reconcile all these conflicting statements? You cannot. You can only come to the conclusion that in such darkness and confusion, they are unable to state the facts with certainty.

Now, gentlemen, these seven boats were commanded as follows: The first, by Capt. *Drew*, from which we have two witnesses, *Zealand* and *Harris*. The second, by Capt. *Beer*, from which we have three witnesses, *Beer*, *Cleverly* and *O'Reilly*. The third by Capt. *Hector*, and he is the only witness from that boat. The fourth, by Capt. *Gordon*, who is the only witness from his boat. The fifth, by Capt. *Battersby*, from which we have two witnesses, *Battersby* and *McGregor*. The sixth, by Capt. *McCormick*, and he is the

only witness. The seventh, by Capt. *Elmsley*, from which boat we have Light and Armour.

Now, gentlemen, let us see if we can get a passage for McLeod on board of Capt. *Elmsley*'s boat, without being discovered? In order to ascertain this matter, let us turn to the depositions of the witnesses who were on board of this boat. How much did Light and Armour know of McLeod? Armour says that he had met him only once or twice before the 29th of December, and knew him only by sight. "I had no personal acquaintance with Alexander McLeod; he was pointed out to me in the streets of Chippewa." He is asked when he was pointed out, whether before or after, and he could not say; he believed him to be a British subject. Armour says, "I did not know all the persons who went on the expedition; I did not see all; but I think I saw half; I recognized a part of them." Light says, "I did not see or recognize the face of each one of them; I knew all in the boat with me but two, who were strangers to me." He does not speak with positiveness at all.

Now, may not McLeod have been one of those two?

Armour says he did not know McLeod by sight. Here we have sweeping declarations, from witnesses who acknowledge they did not know McLeod by sight. What effect can such declarations have. *Armour's* answer to the same question as that put to Light is, that he did not think McLeod was on the beach; he did not come within his view. *Light* says that when they pushed off, they pulled two oars; that he was on the boat which *Elmsley* commanded; that he saw all the persons who were in that boat, but did not see Alexander McLeod that night. He saw all, but McLeod was not one of them. In the cross-interrogatories I have questioned him as to his means of knowledge. He says he did not know McLeod by sight; he did not recognize and speak to all who were in his boat. When they are inquired of, and say they recognized all but two, how strong the suspicion that one of those two might have been the prisoner. When they have said that they did not recognize all, and did not know McLeod, I ask

if there is not room enough left in Elmsley's boat for McLeod without contradicting these witnesses? And again I ask, where is Elmsley? Why is he not here to testify?

We will now pass to Gordon's boat; and Gordon, you will recollect, is the only witness on board his own boat.

Gordon says, "I knew him, but had no personal acquaintance with him." "I think he was once a passenger on board a steamboat which I commanded. I cannot say positively, that I saw him more than once."

And yet, gentlemen, this is the degree of knowledge possessed by that individual, by which to discover him in the black darkness of midnight. Now, let us turn to see how many he knew on board that boat. Gordon says I did not know all in the same boat with me. I did not recognize each one, nor did I speak to each individual. This is the whole that you have, to exclude him from Gordon's boat. He did not see or recognize all that were on board his boat. Here is the testimony of a man who had seen him but once before, and who says he did not recognize all who were on board of his boat. But, gentlemen, are you to throw twelve men into the position of black perjurers, on such a statement? If, then, gentlemen, there were room enough in Gordon's boat, it is enough, and the whole that follows is valueless. Now, if there is one boat in which the testimony is not such as to render it improbable that he was there, it is precisely the same as if all were left open. One is enough, for he could only have gone in one at a time. If there is room enough in Gordon's boat without contradicting Gordon, it is enough; and the whole mass of testimony as to the *alibi* falls to the ground, and is utterly valueless.

Gentlemen, I fear I have fatigued you too long with this part of the testimony, and I take my leave of it.

Now, gentlemen of the jury, let us look into the testimony of those witnesses who have been presented to you, and have testified for the purpose of satisfying you that the prisoner was at the house of Mr. Morrison at Stamford, five or six miles from Chippewa. I confess, gentlemen of the jury, to

my mind a shade is cast over the testimony bearing on that point, by the considerations to which I have before referred when I called your attention to the remarks of a writer on the defense of *alibi*. When they decide on making this defense they select the place where they will set up the *alibi*, and they have the whole world to select from; and you will observe where the prisoner makes that selection. If he declared at the time he was among his associates—if he placed himself in some position where it is manifest he has some control over those around him, it is a matter which a jury should carefully consider. The prisoner at the bar locates himself in a family over which the testimony shows he had obtained a too fatal influence—or over one at least of its members. Now if it appear that he had a control over that family and its movements, their testimony when brought here to save his life, must be cautiously received. If it appears, gentlemen of the jury, that he bears a relation, whether legitimate or illegitimate, to that family, and it is shown that she who lived with him as his wife, resides with that family as the daughter of Mr. Morrison, it is a circumstance to which you will not shut your eyes. There is another consideration which you will legitimately and properly take into your view. When the prisoner went to that house, the question will occur to you, what did he go there for? Men do not act without motive. And again review his course. He started on Thursday to go to Niagara on business; he got to Chippewa; he was there on the afternoon that the Caroline came down; he rested in the afternoon, and at night, a witness says, he started in the wagon with Press again from Chippewa. Press got home about 9 or 10 o'clock; but McLeod stopped at this house. Now, gentlemen, look if there is any motive for going to Morrison's house that night. There are two witnesses, gentlemen of the jury, who have sworn to you that the prisoner was at the house of Mr. Morrison during that night. Mr. and Mrs. Morrison both say they sat up until 12 o'clock with the prisoner, whose guilt is utterly inconsistent with the truth of that statement—and they are the only witnesses presented

before you whose statement is inconsistent with the guilt of the prisoner. If he had been there at 12 o'clock that night, he could not have been present at the destruction the *Caroline*. But what the rest say may be true, and yet he may have been present at the destruction of the boat. I do not say that if McLeod was not at that house at 12 o'clock, that the witnesses are perjured; far from it. I only say they have mistaken one night for another. They may have added some circumstances—I fear they have. The fact that he stayed there and had done so repeatedly, they have disclosed; that he was there on that night, is what no human being can testify to, three or four years afterwards. Neither you nor I could testify whether a fact which took place in 1828, '29 or '30, happened on a particular day; we might say about what time, whether Sunday or the day after Sunday; but to swear to a particular day of the month, is what none can do after that lapse of time.

The testimony of Captain Morrison has been before taken, and to that I must now refer you.

He then stated some things which he does not now recollect; and he recollects now some things of which he had then no knowledge. In the testimony of Mr. Morrison, which was taken before Squire Bell, he said he thought it was near 11 o'clock, when Colonel Cameron called at his gate; on his examination in court, he fixed the hour at 8.

He, Mr. Morrison, now recollects, that McLeod had two horses, for when this new testimony of Press came out, there was a difficulty. The testimony of Press went to show that he had no horse with him. It then became necessary to vary this a little. I will not say it was by design. Then, he was represented as coming on horseback—that the witness saw the horse in the evening and in the morning. Now, he says that he had two horses there. One which he rode, and the other in the stable. And he has here said, that he saw his horse in the stable at night and the next morning—though he does not say that he had two horses, and the implication is, that he had only one; for, you see, that the testimony would

have no application if he had two horses. Mr. Morrison again says, that he saw McLeod in the morning, and that he was walking in front of the house, when he informed him of the destruction of the *Caroline*. Now, it seems that it was in the house. McLeod might have got up and gone out. He never stated that he was not out of the house. He thinks he had never told any one so, or had any conversation upon this subject. He also stated, that he had not heard previously that the steamboat *Caroline* was coming down. Now he says, he had previously heard it. I have a distinct recollection of putting the question, and of his answering. He first stated, that it was dark when McLeod came and that he did not see his horse; but afterwards adds that he, the defendant, generally kept a horse there. You perceive, therefore, gentlemen of the jury, that the statements now made differ somewhat from the statements at first made. It will have its weight with you, as to the infirmity of this witness' recollection.

There is another circumstance which goes to impeach his testimony, with respect to McLeod's being there on Christmas night. You will correct me if I am wrong. If it was Christmas eve, McLeod contradicts him. But if he said Christmas night, then there is no contradiction.

There is another fact, which is sufficient to do away any great weight that the testimony would otherwise have. Each and all of them—Mr. Morrison, Mrs. Morrison, Miss Morrison and Archy, state, that he stayed at their house on the second day of January. They recollect it well, for a son of Mr. Morrison was at home, and they had to remove him out of the parlor to make room for McLeod. If there is a doubt, you are to take it in favor of the prisoner. There is no question about the room. But now, for the second of January. He and his wife, and his daughter and son, all say that they are clear and positive that he was there on the second day of January. That the son was at home, and they cannot be mistaken.

Now the prisoner has taken the testimony of different in-

dividuals, and among others, one says, "I know Alexander McLeod, and I know that he arrived at the North American hotel, in the city of Toronto, on the 31st of December, 1837, and several others; and that he remained at that hotel until Wednesday, the 3rd of January, 1838."

Again I say, I do not suppose that they are all perjured, though it makes nothing in favor of the prisoner. It is to show you that they are all mistaken in that fact, that I speak of it, and that they might as easily be mistaken in this. They have stated positively, that he stayed there on the 2nd of January, and were all mistaken about it. Why may they not then as easily be mistaken when they say that he stayed there on the 29th of December? May it not well be that they have confounded the times? Does not this whole testimony show confusion and misrecollection, which go to destroy the whole weight of the testimony which they have brought?

We will pass to the testimony of Mrs. Morrison. Her statement is different from the others, though she relates the same circumstances and is equally positive as to his being there on the 2nd of January, as on the 29th of December. And in that we have already shown that she was mistaken. She states that McLeod came there with a horse in the evening, and that Col. Cameron of Toronto brought the news of the destruction of the Caroline, in the morning, and it seems that McLeod remained until after breakfast and went away between 9 and 10 o'clock. That she had known McLeod for five years. That he came and brought a horse. That McLeod had stayed there one night before. Mrs. Morrison thought it was Christmas evening. That he had spent Christmas day at witness' house, and never had stayed there at any other time before or since. Here, she swears positively that he had.

She cannot say whether McLeod was married to the daughter of Captain Morrison or not. She now recollects that he stayed there on the second night of January; to this she swears positively, although the fact is impossible, and therefore it destroys her testimony.

Take these two then, and strike them out—the daughter

says that she retired to bed at nine or ten o'clock in the evening. Now the expedition could not have left Chippewa until eleven o'clock that night, for it seemed it was after twelve when they reached the boat; for they had set their twelve o'clock watch, and they might have been occupied an hour in crossing the river. When they started it may have been eleven o'clock. He may therefore have left Morrison's after the daughter had retired; but if he was at Morrison's at twelve o'clock he certainly was not in the expedition; it is physically impossible. This is merely the testimony of Captain Morrison and his wife. Now, as to the testimony of the daughter, it is important in some measure, as regards the Caroline being engaged in the service of the Navy Islanders. She says she is quite positive that she heard of the Caroline being engaged in carrying arms and munitions of war; and she is sure that McLeod stayed at her father's house on the night of the second of January, which facts are inconsistent with each other. She could not have heard this except the intelligence had been brought by McLeod himself. She says she had heard it two or three days before; this leaves the question open to the implication which you cannot resist; that McLeod was there, but not on the twenty-ninth day of December, though perhaps he was there on the night of the thirtieth.

The testimony of Archibald is immaterial, except that he states that Col. Cameron stopped there at the same time, and that McLeod came on horseback. First, he shows that Cameron came there; but he does not know whether it was before or after the destruction of the Caroline, and that McLeod came on horseback, for he recollects taking the horse, and taking the saddle off and putting the horse away.

Now, gentlemen, to sustain and bolster up this testimony, several persons have been brought. Mr. Press tells you that he was at Chippewa the day before the burning; that he was in a wagon; that he went to carry up two passengers; that he was spoken to by McLeod to take him to Niagara, where McLeod resided. He made one or two attempts to start in

the course of the afternoon, but was interrupted. Press says positively that this was the day before the burning of the Caroline, because he finds on his cash book, the entry of five dollars received for carrying these men. He says he has no recollection of making the entry; he went once to Chippewa, and but once, and he infers that it was the twenty-ninth. He was asked whether it was immediately after he returned that he made the entry, or whether it was on some subsequent day. As to this he had no recollection; you are to determine what weight to place upon it. The time that Press brought McLeod to Morrison's we say was not the time that the Morrisons speak of. He came twice, but when he came with Press was not the time that he stayed all night, for they all testified that he then came with a horse, and Press says that he does not think he had a horse when he rode with him; if he had a horse Press must have known it. You must suppose then that there were two occasions. Once he came on horseback when Archy took the horse and put him in the stable; and once he came in Press's wagon, leaving Chippewa at five or six o'clock, and did not stay all night; and where he was, remains to be ascertained.

Press has said that there was time enough for him to have returned twice before the expedition started. The proof of Press and Morrison shows that it was not the time he stayed all night, for at that time he came at such an hour that Press could drive twelve miles after he left Morrison's. He left Chippewa so that he could go eighteen miles and reach home at ten o'clock at night. Now, how many miles will a horse make over very muddy roads with a wagon? My own experience has never carried me beyond what would have required six hours to go from Chippewa to Niagara. At what time, then, must he have started? He says it was after dark. Let us take it to be after dark, then—let them start at five o'clock, and take two hours to get to Stamford; he had a horse in the stable there, and what had he to do but to take his horse and ride back again? There was an object on the part of McLeod not to be known in this transaction. What

that object was, has not been fully disclosed. There appears to be this, that McLeod, on that night, chose not to be known. It was an experiment, a secret matter not openly countenanced. It was not known how the government would consider it; it was of a rash character; and one engaged, like McLeod, in public business, might have been greatly injured in his affairs. There were, therefore, grave reasons why, in the first instance, he might not choose to be known in this transaction. We see that he was particularly cautious to say to Davis and Parke—"Order my horse, I shall have to go to Niagara." These same persons state, however, that after thus saying, in this public manner, that he was going to Niagara, they both saw him afterwards the same evening at Chippewa. This only shows that for some reason he had a motive for choosing to throw a disguise over this affair; and not to have his movements known. You see then why he might have rode with Press in his wagon, and have taken his horse and rode back again from Morrison's in time to engage in this expedition. I am not now stating that these are matters which did actually take place, but I am stating that they are matters which might have taken place, according to the testimony of their own witnesses, and must have taken place according to the testimony of twelve men under oath, produced by the prosecution. Yet you are called on to say that they are all perjured. But you never will do that while you can find any other way for him to go down, for the purpose of disguising his movements, and having the means and time to come back again. Rather than to suppose that these men have all perjured themselves, you are to suppose anything which is not physically impossible in itself. This supposition also disposes of the testimony of Mr. Stocking. Take the supposition that Mr. Press has stated everything perfectly correct—for this is all that they both prove—that he started to go down at about five or six o'clock; he might have been back at eleven to engage in the enterprise, as our witnesses have said they saw him.

You have a painful and solemn duty to perform, and you

will not blame me for placing all the facts before you, that now and hereafter there may be no relenting that you may have given a false verdict. You will, therefore, be patient with me, if I am longer than I otherwise should be.

As to the deposition of Colonel Cameron, we have had no opportunity of cross-examining him. I have no doubt he is a very worthy and good man, of about sixty years of age. I have no doubt he has stated what he believes to be correct, that, on the morning after the destruction of the *Caroline*, about nine o'clock, he stopped at Mr. Morrison's, and that Mr. Morrison came down to his gate, that he then and there held a conversation with him of about five minutes, in which he may have mentioned the destruction of the *Caroline*. Now let us see the statement of Morrison as to this man. He says Mr. Cameron sent for him to come down to the gate. He then told him that an American steamboat had been burnt. The old man was so much engaged in the matter that he had gone down from the Falls to the eddies of the river, and picked up a fragment of the boat. He gives to Mr. Morrison a part of it. His whole heart is full of the subject. Alas! the old man has now forgotten that he even mentioned that subject. Not a word about the fragment. If I could have had an opportunity to examine this good old man, if I could have put a cross-interrogatory—do you believe, if the old gentleman had been asked, “Did you not bring a fragment of the *Caroline*”—he would have answered “Yes?” We know the answer would have been “No”—because it is not here; it is a most conclusive circumstance, that the prisoner's counsel did not put the question, or omitted to note his answer. Captain Morrison says it was about eight o'clock; he says that it was about nine o'clock; that he left Chippewa in the morning, and had traveled six miles over a very bad road, such that a horse had to walk; and if he was there at eight, he must have started at six. Then this old gentleman must go from the high road down to the brink of the river to pick up this fragment. It is very extraordinary that they did not question the old gentleman to see how far he sustained this

account. If both the isolated facts are true in themselves, it only wants some link to be forged to connect them together. It is a trifling difficulty to be detected, but when it is brought to bear against the oath of innocent men, unimpeached, it should have but very little weight.

I shall not detain you, to dwell upon the testimony of Gilkinson and Judge McLean. It is not for me to make out that McLeod was not there on the road at ten or eleven o'clock, because there was time enough for him to have traveled back and forward four or five times after the expedition—but that it was the day after the one that he speaks of; that it was on Sunday that he rode up the river. Smith said that he saw a group of two or three persons on Sunday, which is not inconsistent with the case made out by the prosecution. But if deemed essential, I would ask where is Mr. Foote, who has been subpoenaed by the prisoner and has been here present? Considering they had to combat the oaths of twelve men they had not such a mass of testimony as to render it a work of supererogation. Now I have said all that I propose to say in relation of those witnesses who are brought to confirm the testimony of the Morrisons. What they state may be true, and yet what the Morrisons state may be false. They state circumstances which are consistent with the Morrisons; but further than that, their testimony is rebutted by all those who say that they saw McLeod at Chippewa at ten o'clock, and between eight and nine the previous evening. They testify directly in opposition to the Morrison family, for they say that they saw McLeod there in Chippewa at sunrise, or thereabouts, which is inconsistent with what has been testified by the Morrisons. In addition to this we have produced a witness here to impeach Morrison by his own declaration in other situations. It is Defield. They produced a witness to impeach Defield, and we another to sustain him. They produce a man who says his reputation for truth and veracity is not good, and he cites an instance where he heard several gentlemen commenting upon an oath of Defield, in which he stated that Morrison told him

that he could not say whether it was that or some other evening that McLeod stayed at his house, and therefore De-field must be a bad man. We have produced several who declare that they know him, and know nothing against his truth and veracity. He says Morrison told him that he could not swear it was the twenty-ninth—it was some night near then, and he was in the habit of being there frequently. He swears that he heard Morrison, at his own house and in presence of his own wife, say, that he hoped the Americans would get possession of McLeod and punish him for the part he had taken in the Caroline affair. The declaration of Hamilton, I trust, does not impeach his general veracity, sustained as it is by Robinson, Dyke, and others.

Now, gentlemen of the jury, I am approaching to a close. I have but little more to say to you. I have but one more branch of the subject to place before you. It is the statement of McLeod himself—the first statement which he made when called upon before Justice Bell. This is a statement which a man has a right to make, but is not compelled to make.

He says that on the Christmas eve before the Caroline was burnt he was at Buffalo, and there learned that the steamboat Caroline was then preparing to enter into the Navy Island service; that she was then lying at or near the mouth of Buffalo creek; that he (defendant) the next day went from Buffalo to Chippewa, Upper Canada, and there gave information that the Caroline was fitting out for the Navy Island service, and on the next day, which was Tuesday, he made affidavit to it. And on the night previous to the burning of the Caroline, defendant, on his way to Niagara, stopped at the Pavilion, Niagara Falls, and there learned that the Caroline either had left or was about to leave Buffalo, to come down to Navy Island; and then defendant returned to Chippewa, and called on Colonel McNab, and informed him of the fact; and McNab said he could not act on the fact that the Caroline had merely come down, and could do nothing; defendant and Captain Philip Graham then got a boat between five and six o'clock, either on Thursday or Friday morning, and got eight sailors, and went around the island. They passed between Grand and

Navy Islands about daylight, when they commenced firing upon them from Navy Island, and two musket shots were fired upon them from Grand Island. They got back to Chippewa about 8 o'clock, and defendant remained at Chippewa all that day. Defendant went round the island to see if the Caroline had come down, but did not discover her; but about two o'clock in the afternoon defendant saw her passing from Schlosser to Navy Island.

Defendant then returned to John C. Davis' tavern at Chippewa, and being rather unwell, went to bed about three o'clock in the afternoon and got up again about seven o'clock or a little before, intending to go to Niagara, and directed Davis to get his, defendant's, horse. The defendant took his horse and started away with a Mr. Press, in his, Press', wagon, defendant leading his horse; and when they arrived at Stamford, about five miles from Chippewa, defendant called in at Captain Morrison's, an acquaintance of defendant, and Morrison asked him, defendant, to have his horse put out and to stay all night, and he accordingly did so. He arrived at Captain Morrison's house about eight o'clock p. m., or a little after. Defendant went to bed about eleven o'clock and arose about half-past seven o'clock next morning, and at between eight and nine, Capt. Morrison came to defendant in the parlor where the defendant had slept, defendant then standing in the door of the room; and Morrison said, they have burned an American steamboat last night. The defendant said it must be the Caroline, because she was expected down. He ate breakfast at eight or nine o'clock and then went to Chippewa. He met James M. Dyke, who informed him it was all true.

Now, gentlemen, we have produced Mr. Dyke before you, and what does he tell you? He says that he told McLeod of the evacuation of the Island, and he knows it was that morning, because of the white flag, which he knew was the signal of the evacuation. Upon the examination in chief and upon the cross-examination, Dyke insists that he did tell McLeod; that he spoke of the white flag upon the island, and not of the destruction of the boat. That it was not the destruction of the Caroline, but the evacuation of the island.

Mr. Spencer interrupted the *Attorney-General*, and by permission read from the testimony of Dyke as follows: "I went to Niagara on the morning of the 30th December. I have said repeatedly that I met McLeod that morning. I heard him say that he had slept at Morrison's. I told him I saw him there, and spoke to him about the white flag, when I told him so. I think that was the time of the evacuation of the island, and not the time of the destruction of the *Caroline*."

Mr. Hall: Gentlemen of the Jury, I have one application to make of this fact. A man charged with an offense says I was not there, and offers a witness to prove that he was not there. He vouches a man, who he says told him all the circumstances at a particular place, when he knows full well that he did not do it. If there is any one circumstance which in courts of justice is more damnable than another, it is to find among the vouchers a forged paper to make out a title. When a claim is set up to land and there is a little forgery discovered, it damns the best title.

It is that one circumstance that shows and betrays the falsity that spreads through the whole of the prisoner's case. He came before a justice and endeavored to exculpate himself by a false witness. For whether Dyke knew or not, McLeod knew and must have known full well all the particulars. When therefore he fixes upon him, knowing him to be a false witness, it throws a deep and dark cloud over the whole.

Gentlemen, I have only to remark to you in very few words—you are called upon to say by your verdict, which is most credible, that twelve men should combine together to make out a story, or that Morrison and his wife should be mistaken as to the time. Not that these twelve men should perjure themselves singly and alone, but that they should combine together and dovetail their stories one into another, and that they should have appeared here, and concerted boldly to swear away the life of a man.

Do you believe that the like ever occurred in the history of man? They could not do it. They would be confounded in all their plans and schemes—it is impossible!

Gentlemen of the the jury, there may be one or two consid-

erations not directly connected with the testimony, which may not be improper for me to suggest. Consider whether this is a mere naked act of obedience to an order, which the prisoner considered binding. Think whether it is such a case as that—whether he has not—even supposing the order of McNab was a sufficient warrant to protect the prisoner—gone further than he was called on to go? Was there any necessity for this massacre with swords and pistols? Was there any necessity, after the occupants had left the boat, for pursuing them on the wharf and killing them there? If not, it is no matter how solemn and how binding that order, even if given by our own authority—if he went beyond the order, he showed that depraved and malicious spirit which our law says is the index of murder. He exceeded the necessary force for destroying the *Caroline*, which was the subject of the order.

And, gentlemen, think not that there is palliation to be found in obeying the order of his government. It was a voluntary act; no man was compelled to go.

They were going about and getting volunteers, and even some who engaged to go afterwards refused to go. You perceive by all the testimony that it was entirely a voluntary affair, whether they were engaged or not. There is therefore no palliation from their being compelled; nor has there been any attempt to show that McLeod was not aware of the law, and that he supposed himself bound. Gentlemen, there is no exception to the rule that ignorance of the law can never be pleaded. It pervades the whole system. If the wild Arab and brutal Hottentot should come upon our shore, the moment they arrive the law throws its protecting shield over them, and exacts their obedience in return.

No man is permitted to say he does not know the law. The law knows him, and receives him into its protection as an obedient son. The law, like the Deity, whose voice it is, is everywhere present within the extent of its dominions—it sees all—hears all; its sleepless eye watches over the husbandman in the field, the artisan in his shop, the infant in its cradle—is present to receive the last behest of the aged man as he closes his eyes in death—it hears the stealthy hand of

the robber in the capital; and its eye glares upon the midnight murderer on the border. There is no instance where ignorance of the law can be made available to the criminal.

Gentlemen, my task is done. I have endeavored to perform my duty in this painful matter, and it now devolves upon you to discharge your duty—and, gentlemen, while I take my leave of you, I pray that God may enlighten your minds, and strengthen your hearts, to see the truth and follow it fearlessly.

THE JUDGE'S CHARGE.

JUDGE GRIDLEY. Gentlemen of the Jury: I congratulate you on at length having arrived at the closing scene of this long protracted trial.

After six entire days have been consumed in listening to the evidence, and one day and a half in listening to the arguments of counsel, you have arrived at that period of your labors when you are to enter upon the last solemn duty, which, in the allotment of Providence, you have to perform.

I congratulate you, also upon the auspicious circumstances under which you approach the performance of this duty. It is true, as we are all aware, that a deep and pervading interest has been felt in the issue of this trial throughout this entire land; and we know that a portion of the press, from the earliest moment when the controversy commenced, till this hour, has teemed with inflammatory appeals.

We have heard of the prevalence of popular commotion in various parts of the country, and of one popular outbreak in the county where this indictment originated; setting public justice at defiance, and setting at defiance the ministers of public justice.

Though these disturbances may prevail elsewhere, so far as my knowledge extends, they have not entered this solemn temple of justice. If the waves of excited popular commotion, originating elsewhere, have swept over other quarters, they have been arrested before they reached the portals of

this building, consecrated as it is to the faithful administration of the law, to which the prisoner and the People alike appeal.

We have beheld, as attentive auditors during the progress of this trial, loyal subjects of the British government who were in arms during the recent troubles for the protection of their soil; and on the other hand, we have had the presence of more than one of those distinguished organs and actors connected with the recent unsuccessful and abortive attempts at a revolution in the Canadian provinces. Yet, although these individuals, as well as others who have been present, must have been deeply interested auditors and spectators of what has occurred, not a single murmur has been heard—not a single ebullition of excited feeling has escaped. All has been quietness and good order, and a signal proof has been given, that here is a spot where pure and impartial justice can be administered, and that here, if nowhere else, the law is allowed to be paramount and supreme, and all bow before its sovereign behests.

In approaching the great question upon which you are to pass, allow me to add one more prefatory remark. In order fairly to appreciate this question, it is necessary that you keep your minds free from the consideration of other questions which have nothing to do with this. The counsel who have addressed you on the one side and on the other, have presented such arguments and such topics as they deemed essential to further the interest of the parties which they represent.

But the tribunal which tries has also duties to perform, altogether different from those incumbent on the advocates intrusted with the interests of those who are placed at its bar.

When this case comes to be presented to you, stripped of all the adventitious circumstances by which it is surrounded, it will be no more than an ordinary charge of murder; it is like any other question for the same offense—here, as elsewhere, where such indictments are tried.

The first question then, is, has any murder been committed?

Secondly, is the prisoner at the bar guilty of that murder?

Upon the first question the Supreme Court of this State has passed. Their decision is authoritative on you and on me. We are sitting here to dispense justice in the Circuit Court. This issue, as well as others, has been brought from the Supreme Court to be tried here, and we are to be governed by the decision of that superior tribunal which has sent down this issue to be tried here. It is no longer an open question: it is an adjudicated one, and with it you have no concern. The circumstances out of which the indictment originated are briefly these:

In December, 1837, a body of Canadian refugees and American citizens occupied Navy Island, fortified themselves there, and opened a cannonade upon the Canadian main, where some twenty-five hundred or three thousand men were assembled, to protect the territory upon which they stood. It was alleged that the citizens of Buffalo had given aid to the occupants of Navy Island. William Wells, the owner of the steamboat *Caroline*, for the purpose of promoting his own interests, as he swears before you, had the steamboat cut out from the ice where she lay, in Buffalo creek, and on the morning of the twenty-ninth of December that fatal boat made his first trip from Buffalo to Schlosser, touching at Black Rock and at Navy Island. After that she made two trips between Schlosser and Navy Island; and was instrumental in conveying armed men, as well as arms, provisions, and one piece of ordnance, to Navy Island. Further than this, it does not appear that the *Caroline* was instrumental in promoting the interests of the occupants of Navy Island. The Canadian authorities saw fit to regard this boat as a portion of the armament of the insurgents, and resolved to destroy her; and if, in order to effect this, it should become necessary to destroy life, to do that also; and hence, in furtherance of this design, Sir Allan McNab, the commander of the provincial forces at Chippewa, ordered volunteers to embark in boats. Seven boats started, two of which failed to arrive, but five did arrive, and from these five boats the *Caroline* was boarded while her peaceful occupants were asleep in their berths;

and with swords, pistols, boarding pikes and firearms, the attacking party chased the persons from on board, wounding some and killing one; and whether others experienced a similar fate we know not; and having set fire to the boat, the attacking party sent her over the Falls.

This is a brief history of the transaction, so far as it is necessary for you to consider it, for the purpose of understanding, appreciating and disposing of this question. The act which I have described is held by the prisoner's counsel to be excusable in the individuals performing it, for these reasons: First, that it was authorized by the government which they served, and by the officers to whom they owed obedience; secondly, because it was done in necessary self-defense; thirdly, because the act, though not formally authorized, was afterwards avowed by the government; fourthly, because the whole transaction has already become the subject of negotiation between the two governments, so as to deprive this court of jurisdiction to try the offense.

These arguments have been laid before, and acted upon, by the Supreme Court, and that court has, deliberately and with great learning and uncommon research, examined them all, and pronounced that the killing of Durfee, although performed in the prosecution of an enterprise such as that which I have already described, was murder; and it follows that all who were engaged, aiding or abetting, are guilty of the same offense; and it is not necessary that the arm of McLeod should have struck the mortal blow, to render him guilty. It is enough, that he engaged with others in that enterprise, to authorize you to pronounce him guilty upon evidence which satisfies you of these facts.

This question, then, is to be excluded from your consideration, and I mention it only for the purpose of enabling you to understand how far this portion of the case has been disposed of by a higher tribunal. This question has been already adjudicated, and is at rest.

Then comes the important question upon which you are to pass, is Alexander McLeod guilty of that murder?

The counsel for the People have presented many witnesses

before you, the tendency of whose testimony has been to show that the prisoner is guilty, and in order that you may understand and appreciate this testimony, I shall briefly pass it in review before you. I shall distinguish it into two classes: the first branch will consist of direct and circumstantial evidence, other than that arising from confessions connecting the prisoner with this charge; the second class of evidence will consist entirely of confessions.

The first witness, according to this classification, who has testified before you, is Gilman Appleby. He is the only witness who was on board of the boat at the time of the attack who has sworn that McLeod was there. He was the captain of the boat; he slept in the gentlemen's cabin; he was awoke a little past 12 o'clock, as he thinks, by information that there were boats approaching; he arose and partially dressed, made his way up the companion-way till he found his farther progress arrested; he retreated, but again returned, and had opened the door about a foot, when it was violently thrust open by some one outside, who then made a plunge at him with a sword, which cut off two of his vest buttons, and struck against the metal button of his pantaloons. He was considerably excited, but in that momentary glance he saw the features of the man thus attacking him, and his impression then was that the individual was Alexander McLeod; but with all commendable prudence and caution, for which I honor him, this witness says, that amid the agitation of that moment, and in that hasty glance, he cannot say that it was McLeod. He had once before seen the prisoner in Buffalo, and it struck him that the person who thrust at him was similar in appearance to Alexander McLeod; but it was only one hurried glance; and he immediately replied to the question of counsel when on the stand here, that he could not say that it was Alexander McLeod.

The next witness is Samuel Drown. He resided at Chipewewa, and was engaged in tending bar for one Smith, who kept a tavern there; and he says that he went up on the evening of this transaction to what is called the "cut," and up the Niagara River where the embarkation took place; that

he was at the entrance of this "cut;" that he was at the beacon light when they kindled their fire for the purpose of affording a beacon to guide the boats on their return.

On that occasion he saw the boats passing into the "cut." They came along up the "cut" to the place where they had first embarked, and there they disembarked. He stood near by; within a few feet; it was dark. When asked whether McLeod was among them, his answer is, "I should say he was." He says he went from there to Davis' tavern, where a portion of these persons came, and there, by a light which shone from within the bar room, or by a light on the stoop, although he cannot remember any light hanging out there, he professes to have seen there, again, Alexander McLeod. He says that the next morning, between daylight and sunrise, he heard some of the men in the tavern talking of McLeod's being wounded, and saying he was over on the opposite stoop, some four or five or six rods distant; the witness looked across, he says, and then thought he again recognized McLeod. He says he went over to see whether McLeod was wounded; he saw no one apparently wounded, and did not see him. He was inquired of in relation to the degree of certainty with which he could say that the man whom he saw was McLeod, and he said in reply that "he saw a man whom he called McLeod." Another question was put to him, and he then said, "I mean that I am as sure that it was McLeod as that he now sits before me." This is his testimony. He submitted to a long cross-examination; and how far it went to weaken your confidence in his statements, it is your province, gentlemen, to decide. There is, however, one consideration which I will submit to you. It is this: When you are to judge of the credibility of a witness, it is right and proper that you should observe his manner on the stand; the degree of intelligence which he exhibits; the amount of powers of observation and accuracy of recollection; and, having done so, you are to decide whether his answers satisfy you that he is honest; and on the whole, whether his statement is of such a character, when taken all in all, that you can rely upon it. If you cannot entirely rely upon it—if it ad-

mits of some doubt, you are to weigh it, and give it just so much credit and confidence as you think it merits, and no more. It is argued by the prisoner's counsel that the darkness which prevailed then, and is testified to, was such as made it exceedingly rash for this witness to pronounce so confidently that he was able to recognize McLeod as well and as clearly and certainly as now, by the light of day. It is also argued that he stands before you impeached as to his character for truth and veracity, upon this principle, that where a witness, out of court, has made a different statement from that made by him in court, it should weaken confidence in the statement which he makes under oath. Mr. Bates has been called, who testifies that he lives near the residence of this witness, and he says that he heard him speaking on this subject, I think, at some former period when subpoenaed, and among other things he said he knew nothing in reference to this matter that could do McLeod any harm or any good. The statement which he makes of what he said is somewhat qualified. It is remarked on the other hand that witnesses who are subpoenaed, frequently make careless observations, and that this person being a poor man, might wish to avoid attendance on this trial. This is very true, that persons often make careless remarks, and had Drown made such a statement in presence of any one who could have excused him from attending here, then the plea of counsel would have been entitled to greater regard from you. If in truth the facts which he has here stated were remembered by him at that time—facts which were all material, when the life of the prisoner is at stake—he could not have said consistently with truth that he knew nothing of sufficient importance to harm or benefit the prisoner. This, gentlemen, is the extent of the impeachment of this individual's testimony. You are to take it into your consideration, and so far as it detracts from confidence, you are to exercise your judgment, in order to restore him from this impeachment. I may add, that in order to restore your confidence in Drown, Bates was questioned, and in reply stated that that individual's character for veracity had latterly improved. Mr. Bates went on to say that Drown had been an

intemperate man, and these habits had an effect upon his character, and made him dishonest; but for several years before he went to Canada he had reformed, and since his return he had known of no relapse. So far as he knew, he was an inoffensive man; he was a man in an humble walk of life, and not very intelligent; a man who had not had many opportunities to exhibit what his character was as to withstanding temptation, if offered to him. You have his testimony in the extent in which it has been given; you have heard the reply of the witness called by the Attorney-General, and whether you believe him or not is for you to decide.

The next witness, gentlemen, is Isaac P. Corson. He is a native of this State, a carpenter by trade; he had been in Chipewa in prosecution of his business. He testifies that he was at Mecklem's store three or four times on the afternoon of the 29th December, 1837; that he there saw Mosier, Usher and the prisoner, and at 9 o'clock he saw the prisoner coming out of Davis' tavern; and that he also saw him next morning at sunrise, with others, on the "stoop;" that he was at some little distance that he could see only his head and shoulders; that he was telling of his exploits, and saying that he had killed a d——d Yankee; that he saw him again two or three days afterwards; that he then said he would like to be on another such expedition, and cut out and burn Buffalo. This is an analysis of this witness' testimony which is spread over several pages of my minutes. You will recollect, gentlemen, this witness' cross-examination, and will judge how far that weakened the force of the statements made by him on his direct examination. There is, however, one point that demands your particular attention—it is a point which you should take into consideration and pass upon. This witness was inquired of as to who else were present when he heard McLeod flourishing and boasting of having killed a Yankee. At first the witness could not recollect any one; at length he said he could name one Caswell. He was then asked whether he was present at this trial, and he said yes. He was then asked when it first occurred to him that he saw Caswell there that morning, and he confessed that it was that very moment. The cross-exam-

ination was protracted, and in the course of it, it came out that he had conversed with Caswell as late as the morning of the day on which he testified on the stand before you; that they talked of the affair of the Caroline, and that Caswell informed him that he was there that morning. It may be that that was all true, and that it really did not occur to him that Caswell was there, till the moment the question was put to him. But you are to judge of that.

The next witness is Charles Parke, barkeeper at Davis' tavern—he testifies that the prisoner went to bed at Davis' tavern early in the day, and got up between 8 and 9 o'clock in the evening; that a gentleman called for him and he went out; that half an hour or three-quarters of an hour afterwards he saw him between Davis' and the Chippewa creek; that a good many people were on the road; that McLeod went into one of the boats; that at about sunrise next morning he saw him at Davis'; that he again saw him a few days afterwards in the officers' mess room, and there heard him say that he had killed a d—d Yankee, or something like that. At the close of his examination this witness was asked whether he could say with considerable certainty that he saw McLeod at the "cut," and he said he could; he was asked further, and said he had no doubt of it; he also states that it was pretty dark that night; and testifies also to other facts, on account of which the counsel for the prisoner contends you should take his testimony with considerable grains of allowance. He testifies as to his knowledge of McLeod, and among other things, says that he once went a distance of thirty miles with a brother-in-law, to witness the payment of a sum of money, for which he thinks a receipt was taken, although he cannot remember the amount. It was expected there might be difficulty in relation to it, and his brother-in-law wanted a witness present. It is also argued that this witness tells a very extraordinary story in relation to the manner in which he has been induced to appear here; that he started from home a week before the trial, and had actually got as far as Chippewa, on his way to Buffalo, where he intended to make certain purchases; that he suspected some one who accosted him

on the way, of the design of arresting him, to insure his attendance as a witness on this trial; that he returned home—again set out with another man, to purchase in Buffalo some books for a library, a stove, a pump, and a plough; and that early on the morning after his arrival, he was subpoenaed by a man who had seen him pass through Chippewa, who had crossed the Niagara River, and had gone up to Buffalo for that purpose.

He says, too, that he was ignorant as to the law, and supposed it was a process upon which he could be compelled to attend. That he referred to Mr. Hawley, and Mr. Hawley told him that if he did not consent to attend he would put means in operation to compel him to do so. Well, this may, or may not, be true. It is not the fact, however, that he could have been compelled, however much he may have been urged. He might have made his purchases, and gone out of the country before an attachment could have arrested him. It was only after he had been called here and failed to appear, that an attachment could have been issued, upon which to arrest him, and which would have been powerless in Canada. As to Mr. Hawley having given him that information, we have no light, except what the witness has himself stated. I am not aware that upon a subpoena any witness can be arrested. It is urged that he appears like an intelligent man, and is presumed to know something of the law. It is further urged that this will be more apparent when you look at other facts; he was asked, whether he had seen any person, who solicited him to come, within a week of the time when he started; he says he had been thus solicited within a month; he was inquired of who the persons were that solicited him. He says, they were persons religiously opposed to bearing arms.

Now, I have no opinion to express upon these matters. They have been insisted on by the prisoner's counsel, and it is urged that they ought to destroy the confidence which you would otherwise place in his statements. To you I leave it.

The next witness is Caswell. He says, that he saw the

prisoner the evening before the burning of the Caroline, and the morning after, on the steps of Davis' tavern.

Then comes Anson D. Quinby. He is the witness from Pennsylvania; he testified that he resided some two or three miles from Chippewa; that, on the 29th of December, he went to Chippewa with a load of hay for sale; that the hay was sold to the government; that he did not get paid for it at the time of the sale; that he remained till evening, and in the course of the evening saw the prisoner pass out from Davis' tavern; that he remained there from 9 till 10 o'clock; that he then started for home, stopped at Pettis', about a mile off, all night; that he then turned back, and was again in Chippewa between daylight and sunrise; that he went back to get payment for his hay at the commissary's office; that he was going there when he saw McLeod; that he saw him on the "bridge," and that he there heard him boast of his exploits on the Caroline, and heard him declare that there was the blood of a Yankee on his sleeve. He is questioned then as to whether he expected to receive payment for his hay at that early hour, and whether there were any persons in the office, and he said there were not; that he wished to be there in good season, as he thought he might probably find the clerk, but did not after all get paid, and finally went home. He went through a long cross-examination, which you will call to your recollection.

But, gentlemen, it seems, according to the testimony of Mr. Lott, of Lottsville, Pennsylvania, that on one occasion this Quinby came with another person for the purpose of making an affidavit before Mr. Lott, who is a magistrate, and that that gentleman refused to take the affidavit, because Quinby was unworthy of credit; that he went to another magistrate, by whom the affidavit was taken and sent on. Lott says that he resides in Lottsville, three or four miles distant from Quinby, that the reputation of the witness, Quinby, while resident there for three or four years, was very bad; that he was not to be believed on oath; and that, in informing the prisoner's counsel of his character, he (Mr. Lott) had no private motives of malice or revenge to gratify. He was

asked whether they were not politically opposed, and whether that circumstance had induced him to take part against him. He says not. He says he was once called to testify in a case in which Quinby was on the opposite side; that he had no private griefs to complain of, or grudge to gratify in writing the letter which has been alluded to; he had been induced to do so, because he knew that Quinby was unworthy of credit.

Mr. Wetmore, who resides in Warren county, Pennsylvania, testifies that he has talked with persons, with a view of ascertaining whether the character of Quinby, for truth and veracity, could be impeached. The result of his inquiry was, that it could be; but that his testimony on the occasion was not considered of sufficient importance to render it necessary. Now it is said, and it is true, that ordinarily a witness, to invalidate the testimony of another, should be called from the neighborhood where he lives, and that information which is derived from going into a neighborhood and making inquiries, is not that upon which you can rely for impeachment. This is the law; but this testimony of the lawyer goes a little further. It is possible that this man may have been so often a witness in this county as to have created a sort of court reputation which would justify counsel in saying, if you want a man to swear up to the mark, call upon Anson D. Quinby. So far as he has any such reputation, after living three or four years in the county, it is some reason for concluding that he is not worthy of belief. But you are the arbiters of this question, and to you I leave it.

The evidence of Seth Hinman, for whatever it is worth, is also before you. When examined before, he said McLeod was not seen by him that morning; he now swears he was. You will give this the credit you deem it deserves. Justus F. T. Stevens is then called and sworn. He testifies that he was present on the night in question, and that he saw three boats go out and return; and he distinctly and positively swears that he saw McLeod disembark by the beacon light. That is a statement which is not corroborated by any other witness, and is, on the contrary, hostile to the statements of all the other witnesses on both sides. It cannot be true. He

was dismissed from the stand without cross-examination. He has testified to what is a deliberate falsehood—a falsehood for which the palliating plea of the probability of mistake cannot be offered. Leonard Anson is the next witness. He swears that he was present the next morning after the burning of the *Caroline*, in Davis' barroom; that McLeod stood with his arm on the bar; that he had been drinking; that there were others there who took part in the expedition against the *Caroline*, each boasting as to who had committed the greatest crime; that he saw McLeod draw out his pistol, and heard him declare that he had killed a d——d Yankee; and that he pointed out the blood on the stock of the pistol. This, it is contended on the part of the prisoner, is an improbable story; that he could not have seen the blood on the pistol; and other considerations have been submitted to you in relation to the testimony of this individual, which it is unnecessary for me to dwell upon now. You are the judges of their weight, and the attention which should be given them. These are, I believe, the only witnesses belonging to the first class of evidence. That is, these are the only witnesses who testify of their own knowledge—as to facts unallied with confessions which go to connect McLeod with this enterprise. And the prisoner's counsel contend that some of these witnesses have been impeached, and that others have appeared in very doubtful circumstances; that the darkness of the night was a good reason why no very great confidence should be placed in the statements of those testifying so positively that they recognized McLeod with such certainty. And that what they have thus proved is enough to throw some shade of suspicion on the whole. That is the view taken of it by the prisoner's counsel. Whilst, on the other hand, the counsel for the prosecution insist that it is a mass of testimony which you must believe, and believing which, you cannot doubt the fact of the prisoner's guilt. It is your province to criticise all this and pass upon it. The other branch of the evidence is that contained in the confessions of the prisoner—and there is a principle of law, applicable to that description of evidence, to which the counsel for the prisoner

has directed your attention, and to which it is right that the Court should call your attention, though the counsel has read it to you. It is this, that confessions are the most suspicious kind of evidence—easily fabricated, and difficult to be disproved; liable to be mistaken, liable to be partially heard, partially remembered; liable to be misrepresented; and unless corroborated by other testimony, the rule adopted by the elementary writers, and sanctioned by the most distinguished jurists, is, that they are the most unsafe description of testimony upon which a jury can rely. Nevertheless, they are competent to be weighed, judged of, and passed upon like all the other evidence in the case. I therefore, gentlemen, call your attention to the evidence of Henry Meyers; and I would admonish you that one rule by which you are to test the declarations of witnesses is, that you are to see whether they are probable—such as men in similar circumstances would make; and, whether they call for the indulgence of credulity, you are to judge by these rules. He testifies that on one occasion, about a year anterior to the destruction of the *Caroline*, he had seen McLeod at a tavern, where he stayed overnight; that in passing Niagara Falls on his way, removing back to Geneva, he stopped at a tavern on the north side of the road, and there saw McLeod with a number of others, in a barroom; they were discoursing, about the destruction of the *Caroline*; McLeod was accosted by name, by another of the party; and in answer to a question by some one of the party, “where is the man that killed Durfee?” McLeod exclaimed, “here he is, I am the man,” and drew out a pistol and exhibited it; and then drew a sword and exhibited that; there was blood upon the sword five or six inches from the point; that he boasted he had killed one d—d Yankee, or rebel, and that he compelled the witness to “treat” the party. You will judge of the credibility of this witness’ story. It has been urged upon you, that it is very improbable, even if the sword had been used on the *Caroline*, that blood would have remained upon it ten days afterwards; and that such a story should not gain your credence—but you are the judges of it. This witness goes

further and says, that McLeod attacked him, calling him a d——d rebel, and asked him where he was moving. That he went out to the shed, and McLeod and others followed him out, where it was finally agreed, that if he would go in and treat the company to some refreshment they would let him go; that he did go in and treat to the amount of a dollar, and they then let him go. He says, he knew that it was McLeod, the same whom he had seen a year before. To show that it was Alexander McLeod, and no one else, the witness says, that he was called Alexander McLeod.

He was asked to state the forms of expression—which he did in your hearing—it was like this: “Alexander McLeod, had we better let this man go?”—“Sandy McLeod, shall we go in and take something to drink?”

It has been urged, that it is very improbable that men under such circumstances, would have been as familiar as he represents them to have been—that it is not natural or probable—and that the statement carries with it, its own refutation. Whether it does or not, you are to decide; but there is one circumstance to which no allusion has been made by counsel on either side. He says that having been thus abused by McLeod, he determined that if he ever caught him on this side—he would use McLeod as McLeod had used him. Whether this will give character to his evidence is for you to determine.

The next witness is Calvin Wilson. He was the keeper of a ferry at Youngstown. He says to you, that a few days after the destruction of the *Caroline*, between the fifth and fifteenth of January, he went over into Canada, and went into a house where was the prisoner, and one Raincock, with whom he was well acquainted, he having been a custom house officer with whom the witness had done much business. There was also Mosier, Elmsley and other distinguished actors in this scene. While there the question came up in relation to the *Caroline*. McLeod declared that one d——d rebel or Yankee, had got shot on the wharf.

He was cross-examined; and acknowledged that his feelings are enlisted in the Patriot cause; that, though a poor

man with a family, he had contributed \$200 for the promotion of that cause; when he was asked if he had not been personally engaged in some enterprise against a foreign government, he refused to answer, and when inquired of whether he had not harbored Lett, he declined answering the question. The counsel for the prisoner have argued, that you are to take this as an acknowledgment that he did engage in that enterprise with the Patriots.

You are not to take for granted that he was actually guilty of any criminal act, by reason of his refusing to answer the question; because he is fully authorized, by an established rule of law, to decline answering any question, which may, by possibility, implicate himself; because there may be circumstances connecting him with those transactions, sufficient to convict him though innocent. Therefore this broad rule which the law allows in relation to matters which may tend to convict him for any offense. It is not to be inferred that he was guilty of perjury, merely because he throws over himself the shield, which the law affords him, for his protection; or that he was guilty of harboring Lett, because he refused to answer the question. These are independent grounds.

But he makes Raincock one of the persons with whom he held conversation on the occasion alluded to; he makes him the person who opened the conversation; and says he was a person with whom he was well acquainted; he declares to you that he was not mistaken, but actually saw him there; though evidence has been submitted on the part of the prisoner, which goes very strongly to show that his statement is not true. Mr. Hamilton says that he and his lady had been, through the previous summer, in England; that before he left the province of Canada for England, he was well acquainted with Raincock; that he was a most intimate companion; so much so that Raincock persuaded the witness to leave his own lodgings, and come and board where Raincock did.

He left England, and returned to Canada in the last of October, or the first of November. He found, on his arrival, that Raincock had become embarrassed, and had left the

country, before the troubles commenced. Their residence was a small village containing only about seven hundred and fifty inhabitants, and he knows that Raincock was not there.

Another witness, Mr. Stocking, who resides in the same village, says that Raincock left before the troubles commenced. Both these witnesses testify that he was not there, and could not have been there without their knowledge: and if you believe he was not there, it is a refutation of the statement of this witness, Wilson. But if they are mistaken, and he was there, his statement is not affected.

Sarles Yates, another witness, has testified nothing worth hearing.

The next witness is Timothy Wheaton. He was called by permission after the prosecution rested—the Attorney-General supposing that there had been a reservation in favor of this witness being admitted to testify. He deposes that about a year after the affair of the *Caroline*, he went from his residence at Whitby, near Toronto, to Niagara; that he was near the ferry; that he saw McLeod coming up from the water side, and the witness remarked to him that the sentinels had a hard time of it; that they then talked of the Navy Islanders, and about their number; that McLeod said they never would have the *Caroline* there again, and added that he was the second or third man who boarded her; that then some person, a stranger to witness, interrupted the conversation by taking McLeod off; that he (the witness) turned from the ferry, although he had set out to go to Lockport, yet recollecting he had not a pass, and being fearful that he would not be allowed to cross the river, he turned short about and went home. Gentlemen, you are carefully to examine this evidence, and decide according to your conscientious conviction of the truth, as it really is.

These are the facts as they have been given in evidence: you have that evidence before you, and you are to pass upon it. You are then to take the entire mass of this evidence, and decide upon the weight which is to be attached to it, fearless of consequences; and as you really believe the truth is. If you believe this evidence, notwithstanding some ob-

jections have been made to it, and some deductions are to be made on account of impeachments; if you believe after all that there is an amount of evidence, which requires you to call upon the prisoner to answer; you will then take up the defense which has been spread before you. It is undeniable that much of it is very questionable; still, after all, it is undeniable that it bears very hard upon the question of the prisoner's guilt.

You are now to look at the prisoner's side, because it is the right of every man put on trial to present his witnesses, have them examined, and if he succeed in establishing the defense, to have the full benefit of it accorded to him. That defense, gentlemen, is what is called an *alibi*. It is, in other words, that he had no part or lot—no sort of participation in this enterprise. And this, after the disposal of the first question already passed upon by the Supreme Court, is the only other ground of defense that exists. And in my judgment no degree of suspicion should attach to it as an original defense, because it is, as I have just said, the only defense that remains for the prisoner at the bar. If he were, in truth, upon the expedition, then he is guilty, and so you must pronounce him. But, gentlemen, if he was at that time five or six or seven miles distant—if he had no participation in that enterprise, then the same great principles of justice require that you should pronounce him innocent. The evidence sustaining this defense consists of the depositions of individuals avowedly participating in the expedition; and secondly, of the oral testimony of several individuals, showing, or tending to show, that McLeod was during the execution of this enterprise at a distant spot in another town. First, then, with regard to the evidence of the commissions. The prisoner's counsel is right in telling you that evidence taken in this way is, and should be, less satisfactory than that given personally before you. But so far as the depositions themselves go to describe the individuals testifying, you may derive some information respecting the standing and character of these individuals. Some of them are lawyers, some of them mariners, and some of them officers in her majesty's

service; and, by their description, they should all be men of character and responsibility: whether they were or not we have no means of knowing.

It has been said that this commission was a "roving commission;" that witnesses were examined whose names had not been before furnished to the opposite counsel. The Attorney-General admitted that there was no reproach to be attached to the learned counsel on the other side, for it was not known who could be found: that many names were given, and with a commendable liberality, leave was given to examine more witnesses than those named. It has been said also that the clerk of the commissioners was engaged in getting together the witnesses, and that some suspicion should attach to this evidence on that account. Under some circumstances the observation would be correct, and entitled to your consideration; but we have heard in what manner they were executed, and you will be able to determine whether this latter objection should carry any weight.

The interrogatories were read over to each witness, and as each answer was obtained, such answer was dictated by the commissioners and written down by the clerk as amanuensis: and this mode was pursued throughout. Whether this scribe was a proper person to be employed, whether his feelings were interested one way or the other, it could make very little difference with the testimony. It has been said, too, that on one occasion, when Mr. Harris was examined, the commissioners refused to take down his answer as he gave it. It related to the mode and manner in which he had acted, and the degree of activity which he had used. He stated that he ignited two "carcasses," or instruments of combustion, and threw one in one part and another in another part of the boat. The commissioners substituted the statement, that he was very active in the destruction of the boat. It is not perceivable how this could be considered very important, as it does not conflict with the statement of any other witness. Again, it has been stated that these depositions are not entitled to full credit, because the deponents avow themselves accomplices in the transaction. The law is, undoubtedly, that

in ordinary cases in the trial of individuals for felony, the witnesses for the People are not entitled to so much credence where they confess themselves accomplices, as fair and disinterested witnesses would be, because the former testify under a powerful motive. When the people put a witness upon the stand to swear against an accomplice, it is supposed they will not hold such witness responsible for participation in the crime. If this were an ordinary indictment, for a murder of ordinary description, then the mooted point would be this objection. But as regards these individuals, we have no doubt as to their participation in the offense: they were all guilty of the murder of that individual who lost his life on the occasion of the destruction of the *Caroline*. There are distinguished men in our country, however, who hold that those persons ought not to be held individually responsible if they regarded themselves as engaged in a public enterprise. It does not involve the moral guilt of an ordinary murder, if they regard it as a public achievement, a kind of war; and they claim the same amenity as would be accorded to those engaged in a common war. Then you will perceive that the same degree of deduction from their credence ought not to be made, as should be made in cases such as I have alluded to; nevertheless, it is a subject for your consideration. If you consider it should detract from the degree of confidence to be placed in them, so much deduction will you make.

The Attorney-General has criticised the testimony of these deponents with great minuteness, and equally great ability. He has pointed out where the witnesses have testified inconsistently with each other, and made a very ingenious argument to show that they testified untruly. They testify that there was resistance; that pistols were fired, and that some were wounded—when, if we believe those on the boat, no resistance was made at all—that they were unarmed, and that they fled for their lives, and they were pursued with arms by those men. On the other side, one and all of them have sworn, that there was resistance. If they did this with a knowledge that they were testifying falsely, it does certainly

detract largely from the confidence to be placed in their statements. But I think it was Wells himself who said, as the boarders approached the boat in the darkness of the night, and in the confusion of the *melée*, they all taking a part, had mistaken each other for the occupants of the boat, and that they fought together. If that were true, then it would follow that in testifying as to resistance encountered on board the boat, they were not false in the corrupt sense of the term. It has again been said by one, that there were so many, on this expedition, by others that there was some other number. Now, some may have stated the number that reached the boat; others, the whole number engaged in the expedition in the seven boats; and so far as they have stated positively, and these positive statements have turned out to be untrue, so much you will detract from the confidence which you would otherwise place in them.

Passing from this, gentlemen, there is this other consideration, which must strike you in the outset. If, when Alexander McLeod sued out this commission, and directed the commissioners to examine persons who had been in each of the boats, upon the question whether he was there or not, and if in truth he were there on this occasion, he must be a bold man indeed. Because he must either have supposed that the commissioners would take only those who could not have known whether he was there or not, or that these men would be so corrupt as to swear falsely, to extricate him from the punishment of his crime. But this is no further evidence than as it is a portion of the history of the transaction; and with these views you are to take up the testimony and ascertain, after solemn inquiry, how much credit you should give these witnesses and how far they are to be believed in their statements.

Now, gentlemen, one word to begin with. It is undoubtedly true, gentlemen, that Sears cannot say, with any degree of certainty, that McLeod was not on board the expedition. It is equally true, that McNab cannot say so, although he superintended the embarkation of the persons engaged in the enterprise, was on the beach, and communicated the last com-

mand in a whisper to Drew. None but the All-seeing eye could penetrate the darkness that shrouded those there associated. But there are some, one or more of the inmates of each particular boat who were there engaged, and who have been examined on oath. Some of them knew McLeod well before that time; others became acquainted with him afterwards; some talked with and recognized all their associates, and they all testified that McLeod was not among them on that night, though, in the strict sense of the term, they did not recognize them, because to recognize is to remember the face of one whom you have seen before. In that sense, some of them certainly did answer that they saw them, though they did not recognize them. In listening to the reading of those interrogations I may have erred; but as I listened to them, it was my impression that the witnesses all stated, either that they knew McLeod was not there, or they could safely say that McLeod was not before them. I may have misunderstood, but from the answers given to all, I gathered this as the substance of those answers. It may well be, that you should give the preference to the positive testimony of a witness who was upon the spot at the time, because it is far more satisfactory than that of one who says, "I did not see him;" but the degree of strength should depend on the attending circumstances, and upon the opportunities which the party has to know the truth of what he avers. If one of your number should ride with me in a wagon from here to Whitesborough, you would swear positively that I was in the wagon; and if one of you should ride alone, you would swear unequivocally that I was not in the wagon; and the opportunity would be such that you could say with entire certainty that I was not there; in that case, and in all like cases, the confidence which ought to be attached to testimony, should vary in proportion to the opportunity to know.

Now those boats contained some eight or nine persons each, all of whom embarked and crossed the Niagara River, before they reached the fatal spot where this catastrophe took place. You will determine what confidence to place in their statements, when each one says that he knows McLeod was not in

his boat, and so far as his own boat is concerned, he ventures to say with positiveness, that he was not there. You will consider the darkness of the night, the conversation which took place, and the opportunities which they had to know these facts; and then judge and state the result of that judgment under the solemnity of your oaths. I leave this portion of the evidence, with a single remaining statement. You are to examine the testimony and deduct what you think ought to be deducted.

It is the prisoner's right, standing upon trial for life or death, if there is testimony which goes to exclude him from a participation in that enterprise; it is the solemn duty of the jury to weigh it, and allow it to have its appropriate influence.

Passing from this, the prisoner gives other evidence, not to show that he was not in the expedition, but for the purpose of showing that he was in another place, and that he could not have been there unless the laws of physical nature can be changed, and a man becomes capable of ubiquity—of being in Stamford and at Schlosser at the same time. You will lend an attentive ear to this part of the testimony.

I first call your attention to the testimony of Mr. Press. He was an inn-keeper at Niagara, which was the place of residence of Alexander McLeod. Press testifies that on a particular occasion during the Canadian troubles, he went from Niagara to Chippewa in a wagon—that he carried up two passengers, whose names he has given you.

He arrived in Chippewa and remained there until towards night; that he saw the prisoner, McLeod there, who informed him, that he was desirous of going to Niagara with him. Some time in the afternoon, when he wanted to start, he could not find McLeod; he continued to wait, and finally did find him about dark, or a little after; he testifies that McLeod came out of Davis.' Witness had not his horses at Davis', but in a yard opposite. Where McLeod got in, witness cannot precisely say; but that he did get into the wagon with him, and that he drove down the river, over a very bad road; for about two miles and a half, he drove slowly by

necessity; that the residue of the road was better, though not very good. He drove on as far as Stamford, opposite the gate of Captain Morrison, where McLeod got out and went towards the house, which is the last that witness saw of him. It is an important point for you to determine, whether this was the night of the twenty-ninth of December, or another night. If any other, it breaks the chain of evidence. In relation to its being that night Press testifies that he had a partner at the time; that he kept a cash book; that his entries were made consecutively; that he finds an entry of the five dollars, received from the two persons for their passage to Chippewa, of that date. He was cross-examined with much ingenuity, and at great length, whether this entry might not, possibly, have been made afterwards. He says no, the entries are consecutive, and this entry is in its place upon that very day; independently of this, he says he has reason to know it was the same day before the night in which the Caroline was destroyed.

In relation to times and dates it is true, that the human mind is so constituted that it is most difficult to fix with certainty, at what period of time any given event transpired.

We must have reference to some epoch, or event, standing in bold relief, around which others are made to cluster. If any of you, gentlemen, had a house burned on a particular day, other events happening to occur the same morning or night, would live long in your memories; so too the destruction of the Caroline, from that time forward, will serve as an epoch, for all who felt an interest in the political agitation of the times, upon both sides, by which to bring to recollection minor circumstances and events. It is an epoch which will be remembered as having given rise to the present trial, and which has been the occasion of requiring your attendance and services, at the present trial. It is an event which will live in the memory of all who witnessed it, and who were made acquainted with the circumstances; and it is therefore submitted to you, whether Mr. Press is warranted in speaking with such certainty as to the particular day. He says, he knows, from other circumstances, independently of the

fact that he had made a written memorandum, that he started from Chippewa on the evening of the twenty-ninth of December.

Captain Stocking, who was on service, having command of a troop of dragoons, whose residence is at Niagara, and who is a particular friend of Mr. Press, says that Mr. Press called at his quarters in Chippewa on the twenty-ninth of December, and dined with him; feeling bound to show the ordinary courtesies to his neighbor, who was a comparative stranger there, he took a walk with him up the margin of the Niagara, and looking across the stream, they saw the steamboat *Caroline* making her first trip. He is entirely certain that this was the first, and only time, that he ever saw her crossing there. Indeed she never made trips there, but one day. She came down in the morning, and met her fate at night. If Captain Stocking is right, and Press is right, that the very day on which Press alleges himself to have been there, and the evening on which he took McLeod to Stamford, was the evening of the twenty-ninth of December, much doubt will be removed from your minds. But you now are met with a difficulty, and it is a difficulty which you must solve.

The proposition of the defense is this; that Press left McLeod at Morrison's; that McLeod stayed all night there, and in the morning was informed of the destruction of the *Caroline*; that he mounted his horse and rode to Chippewa; while riding up the Niagara River, he fell in with Mr. Gilkinson; that they passed through Chippewa, and continued up the river; that a cannon ball discharged from Navy Island reached the shore; that a soldier picked it up and handed it to McLeod; that McLeod went back the same day and carried it along as a trophy.

Now for the difficulty: McLeod, before 'Squire Bell, says that he mounted his horse and rode him; and on a second examination, he says that he took his horse and led him.

The Morrison family, so far as they speak and know, testify to his having a horse. Archibald says that he put out the horse; whether any one saw that he rode there on horseback, does not appear.

Press did not testify that he had a horse. He was questioned by the Attorney-General, "Did McLeod have anything along with him?" "If he had had a horse, would you not have observed it?" "Certainly I should." Such was the statement of this witness, from his belief and recollection—that there was no horse led. It would seem singular that a horse should be attached to the back part of his wagon and he not know it, though it would be possible; and whether the other evidence shows it probable, you are to determine—that being an incident merely, and not a material part of the testimony.

That is the argument of the prisoner's counsel, and you are to judge of its strength and probability, and whether there is any other mode of explanation. It is before you; and I leave it for you to determine.

When we pass from this period of time, and get in front of Mr. Morrison's cottage, we find him walking up to the house and entering about 8 o'clock in the evening. He went in there, for he was on familiar terms with the family. He had a great deal of business to do in the line of his official duty, and therefore kept a horse at Mr. Morrison's. It is stated that he went in and spoke to Archy to put out his horse. All the members of the family, four in number, swear that he came there that night—that he was there at tea. All except the young man swear that he was there, up to a period of time between 9 and 10 o'clock; about this the boy cannot say; but Mr. Morrison and his wife both say that he was there afterwards till 12 o'clock, and after that they all retired to bed. A cot-bed was made up in the parlor for McLeod. His boots, which were wet the evening previous and had been placed by the stove, or kitchen fire, were dry in the morning. He was seen getting up in the morning, and when but partially dressed.

Mr. Morrison was called to the gate by Col. Cameron, an intimate friend, with whom he had served in the peninsular war in Europe, under the Duke of Wellington. Col. Cameron had come down from Chippewa with intelligence that the Caroline was destroyed—he had obtained, and he there

presented to Mr. Morrison, as a trophy, a small piece of painted wood, which had been part of the *Caroline*. He (Mr. Morrison) took it to the house, sawed off a piece, and carried back the remainder. He took this piece of wood and showed it to McLeod, saying, "what do you think has happened? The *Caroline* is destroyed." McLeod says, "is it possible!—Captain, where is Archy? Send for my horse; I will go up immediately." He however consented to wait for breakfast, and then started on his way.

Then comes the next witness—Mr. Gilkinson—a resident of Niagara, who knew McLeod well. He was a volunteer at Chippewa; but as they were very full at Chippewa, he went to sleep at Stamford, below Morrison's. He came along in the morning and overtook McLeod before he reached the Falls; they went along together up to Chippewa; and he says he can state with absolute certainty that this was the morning of the 30th of December; that he was thus on his way from Stamford, and that he thus overtook and rode with McLeod to Chippewa; that without dismounting they rode up the Niagara River, till they were opposite Navy Island; that the batteries on the island were opened upon them; that a cannon ball lodged in the bank near them; that one of the soldiers ran there, seized it, and gave it to McLeod, and he has since seen it in his possession.

The witness Sears says that he also was up there about this hour; that he saw McLeod and another ride along, and witnessed the firing from the Island.

Now this is not the whole of the testimony upon the subject of his coming up on that occasion.

Judge McLean, whose testimony you will bear in mind, was engaged by the then acting District-Attorney of the northern district of the state of New York, to go to the Canada side on a confidential mission to Colonel McNab. He went to Chippewa, and called on Colonel McNab, who ushered him into his quarters, and then excused himself during the night. The witness says he heard before morning of the blazing *Caroline* passing over the rapids and over the cataract. He knew McLeod, having seen him but a few days previous at

Buffalo, where McLeod had got into some difficulty; and the witness (McLean) had aided him in making his escape. The next morning he got up, and at some 9 or 10 o'clock started off down the river; and near the Pavilion he met McLeod on horseback riding towards Chippewa.

This is the aggregate of the evidence on this branch of the subject. The testimony of the Morrisons, and the declarations which McLeod made on examination, have been submitted to you, and criticised by the learned Attorney-General with great ability. If he has satisfied you that these Morrisons are mistaken as to the dates, and in relation to this great epoch, then the defense vanishes. But if it be true, that though they have been mistaken in relation to some things; that though the old gentleman had not heard that the Caroline was coming down to engage in carrying arms and munitions of war, and the young lady had heard it; though they might have confounded that which McLeod said at a subsequent time with what then took place; and still in relation to this great question be right—though wrong as to other matters—for instance, that instead of the second it was in fact on the fourth of January that McLeod was there the second time; if you believe that they were uncertain in their recollection as to this, and yet quite right upon the great question as to whether McLeod was at their house on the night when the Caroline was burnt—if, upon that point you determine that they are right, then there is an end of this case.

But if you believe that their testimony has been so successfully attacked, that they have been shown to be guilty of wilful or intentional misrepresentation, so that you cannot believe them in relation to this great question—this great epoch, which stands out so prominently from other portions of time—if in that light they are not corroborated, or if it appear to you that this evidence is all founded in mistake; that some other portion of time has been confounded in the recollection of these witnesses with the period in question—I repeat, that you will in the one case set it aside altogether, as unsatisfactory and unworthy of belief, and in the other,

you will detract from it so much as deserves to be detracted; and if the whole, you will set aside the whole.

It is true that Colonel Cameron corroborates the statement of the Morrison family. He came along and had an interview with his old friend whom he had known in other days. So far as that is corroboration, it is worthy of your attention. You are to consider this, and then say whether all this has satisfied you—that the case made out on the part of the People is brought together and bound up in perjury, or consists in some great and unexplained mistake; in either case you will acquit him.

But this is not all; in the defense upon a criminal case, you are not required to be absolutely sure. It is enough if the prisoner has presented such a case, that as to his guilt or innocence there is a reasonable doubt; because the humane laws of this land take no man's life unless upon clear and satisfactory evidence. It is a portion of our law, and it is the glory of it, that while it demands obedience to the extent of death itself, it never proceeds to this last extreme; it never divides the living from the dead; it never consigns an individual to the tomb, unless there is irrefragable evidence to induce a jury to believe, not that there is a mere preponderance, but that it is so overwhelming as to bear down the defense, so that there is no reasonable doubt of the existence of the crime, and that it is an imperative duty of the jury to consign him to the grave.

You are bound to do this as well in the performance of that duty which you owe to your God, as of that which you owe to your country, to the prisoner, and yourselves; all have a right to demand it in passing upon this great issue; this feature of the law is the great shield, the great ægis which the law has thrown around and over the heads of those who are brought to the bar of justice for crime.

It is then with you. I have thus gone through the great mass of evidence in this case, much of it not in detail, as it would have occupied much time to do so; yet I have gone through the great leading features of the case; and have presented them to you, together with the principles by which

you are to be governed, according to the best of my ability. Now my duty is performed; your duty—and it is the highest duty which you can ever be called to discharge—the most solemn duty which your country ever reposes in her citizens—your duty is about to commence. You are to take this subject into your deliberate consideration, weigh and decide upon every portion of it; call into exercise your best powers of judgment; free your minds from bias, if any exist: you are to approach the consideration of this question, looking at it through the testimony which you have heard upon the stand, and that alone; discarding all considerations which have been held out by counsel, all rumors which may have reached your ears; everything but the polar star of looking to the evidence to ascertain what is the truth. When you come to your decision, and determine where the truth is, let it be with an independence that shall do honor to a jury—with that impartiality which your country expects at your hands. With a single eye to the demands of justice, pronounce your verdict: and when you have pronounced it in the best exercise of your judgment, and of this great duty which you have to perform, I trust that all those who have witnessed this trial, and the manner in which it has been conducted—all those who have heard the able arguments which have been submitted by counsel, and the patience with which you have heard and drunk in the evidence, as portion after portion of it has been unfolded before you—that all those who have seen your anxious endeavors to arrive at the truth, will be satisfied.

If you shall believe that this man is guilty of murder, then, fearless of consequences, whatever those consequences may be—though they shall wrap your country in a flame of war—whatever the result, look with a single eye to truth, and a hand firm to duty; look to the God of Justice, and say whether the prisoner be guilty or not.

If he has successfully met this charge and defended himself against it, then there is another duty to perform, irrespective of any rumors or charges; irrespective of any considerations which may be held out to you, or which may have

entered your minds or exercised an influence over you—with the same fearless intrepidity pronounce that he is not guilty.

Now, gentlemen, I commit to you this great case with its solemn duties, and the rights of your country; and may the God of all justice and truth preside over your deliberations, and may the verdict which you render be in accordance with the foundations of his throne and his government.

THE VERDICT OF ACQUITTAL.

At about 4 o'clock in the afternoon the charge was concluded, and the case was then given to the jury, who retired. In twenty minutes the jury returned.

The Clerk. Have you agreed upon a verdict, gentlemen of the Jury?

The Foreman. We have.

The Clerk. What say you, gentlemen, do you find Alexander McLeod guilty or not guilty?

The Foreman. Not Guilty.

All was hushed and quiet—no excitement was visible anywhere. The prisoner's eyes brightened up, and taking his hat and cloak, he slowly retired with his counsel.

The following are the letters which passed between the English Minister to the United States, Mr. Fox,¹⁴ and the American Secretary of State, Mr. Webster,¹⁵ and whose introduction in evidence was rejected by the Court. See *ante*, pp. 101-103.

⁵ COWAN, ESEK. (1787-1844.) Born Rhode Island; went with his family to Saratoga Co., N. Y., 1790, and to Hartford, Washington Co., 1794; taught school, studied law and admitted to bar, 1810; practiced for a time in Northumberland, removing to Saratoga in 1812; reporter, New York Court of Errors, 1823-1828; Judge Fourth Circuit, 1828-1836; Justice Supreme Court, 1836-1844; acquired a wide reputation by reason of the character and importance of his judicial rulings. Author of "Civil Jurisdiction of Justices of the Peace in New York (1844); "New York Digested Index of Reports" (1831); edited Phillips on Evidence (1850); New York Reports (9 vols., 1824-1830). Died in Albany, N. Y. See *ante*, p. 65.

¹⁴ FOX, HENRY STEPHEN. (1791-1846.) Educated at Eton and Oxford and early chose a diplomatic career; minister at Buenos Ayres, 1830; Rio de Janeiro, 1832; Washington, 1835, where he died.

¹⁵ WEBSTER, DANIEL. See *post*, p. 414.

No. 1.

MR. FOX TO MR. WEBSTER.

Washington, March 12, 1841.

The undersigned, Her Britannic Majesty's envoy extraordinary and minister plenipotentiary, is instructed by his Government to make the following official communication to the Government of the United States:

Her Majesty's Government have had under their consideration the correspondence which took place at Washington in December last, between the United States Secretary of State, Mr. Forsyth,¹⁶ and the undersigned, comprising two official letters from the undersigned to Mr. Forsyth, dated the 13th and 29th of December, and two official letters from Mr. Forsyth to the undersigned, dated the 26th and 30th of the same month, upon the subject of the arrest and imprisonment of Mr. Alexander McLeod, of Upper Canada, by the authorities of the State of New York, upon a pretended charge of arson and murder, as having been engaged in the capture and destruction of the steamboat *Caroline*, on the 29th of December, 1837.

The undersigned is directed, in the first place, to make known to the Government of the United States that her Majesty's Government entirely approve of the course pursued by the undersigned in that correspondence, and of the language adopted by him in the official letters above mentioned.

And the undersigned is now instructed again to demand from the Government of the United States, formally, in the name of the British Government, the immediate release of Mr. Alexander McLeod.

The grounds upon which the British Government make this demand upon the Government of the United States are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defence of her Majesty's territories and for the protection of her Majesty's subjects; and that consequently those subjects of her Majesty who engaged in that transaction were performing an act of public duty for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country.

The transaction in question may have been, as her Majesty's Government are of opinion that it was, a justifiable employment

¹⁶ FORSYTH, JOHN. (1780-1841.) Born Fredericksburg, Va. Attorney-General, Ga., 1813-1819; Representative from Georgia in the 13th, 14th, 15th, 18th and 19th Congresses; United States Senator, 1817-1833; Governor of Georgia, 1822-1829; Minister to Spain, 1819-1822; Secretary of State, 1832-1841. Died in Washington.

of force for the purpose of defending the British territory from the unprovoked attack of a band of British rebels and American pirates, who, having been permitted to arm and organize themselves within the territory of the United States, had actually invaded and occupied a portion of the territory of her Majesty; or it may have been, as alleged by Mr. Forsyth, in his note to the undersigned of the 26th of December, "a most unjustifiable invasion in time of peace of the territory of the United States." But this is a question especially of a political and international kind, which can be discussed and settled only between the two Governments, and which the courts of justice of the State of New York cannot by possibility have any means of judging or any right of deciding.

It would be contrary to the universal practice of civilized nations to fix individual responsibility upon persons who, with the sanction or by the orders of the constituted authorities of a State, engaged in military or naval enterprises in their country's cause; and it is obvious that the introduction of such a principle would aggravate beyond measure the miseries, and would frightfully increase the demoralizing effects of war, by mixing up with national exasperation the ferocity of personal passions, and the cruelty and bitterness of individual revenge.

Her Majesty's Government cannot believe that the Government of the United States can really intend to set an example so fraught with evil to the community of nations, and the direct tendency of which must be to bring back into the practice of modern war, atrocities which civilization and Christianity have long since banished.

Neither can her Majesty's Government admit for a moment the validity of the doctrine advanced by Mr. Forsyth, that the Federal Government of the United States has no power to interfere in the matter in question, and that the decision thereof must rest solely and entirely with the State of New York.

With the particulars of the internal compact which may exist between the several States that compose the Union, foreign Powers have nothing to do: the relations of foreign Powers are with the aggregate Union; that Union is to them represented by the Federal Government; and of that Union the Federal Government is to them the only organ. Therefore, when a foreign Power has redress to demand for a wrong done to it by any State of the Union, it is to the Federal Government, and not to the separate State, that such Power must look for redress for that wrong. And such foreign Power cannot admit the plea that the separate State is an independent body over which the Federal Government has no control. It is obvious that such a doctrine, if admitted, would at once go to a dissolution of the Union as far as its relations with foreign Powers are concerned; and that foreign Powers in such case, instead of accrediting diplomatic agents to the Federal Government, would send such agents not to that Government, but to the Government of each separate State; and would make their relations of peace and war with each State depend upon the result

of their separate intercourse with such State, without reference to the relations they might have with the rest.

Her Majesty's Government apprehend that the above is not the conclusion at which the Government of the United States intend to arrive; yet such is the conclusion to which the arguments that have been advanced by Mr. Forsyth necessarily lead.

But, be that as it may, her Majesty's Government formally demand, upon the grounds already stated, the immediate release of Mr. McLeod; and her Majesty's Government entreat the President of the United States to take into his most deliberate consideration the serious nature of the consequences which must ensue from a rejection of this demand.

The United States Government will perceive that, in demanding Mr. McLeod's release, her Majesty's Government argue upon the assumption that he was one of the persons engaged in the capture of the steamboat "Caroline;" but her Majesty's Government have the strongest reasons for being convinced that Mr. McLeod was not, in fact, engaged in that transaction; and the undersigned is hereupon instructed to say that, although the circumstance itself makes no difference in the political and international question at issue, and although her Majesty's Government do not demand Mr. McLeod's release upon the ground that he was not concerned in the capture of the "Caroline," but upon the ground that the capture of the "Caroline" was a transaction of a public character, for which the persons engaged in it cannot incur private and personal responsibility; yet the Government of the United States must not disguise from themselves that the fact that Mr. McLeod was not engaged in the transaction must necessarily tend greatly to inflame that national resentment which any harm that shall be suffered by Mr. McLeod at the hands of the authorities of the State of New York, will infallibly excite throughout the whole of the British Empire.

The undersigned, in addressing the present official communication, by order of his Government, to Mr. Webster, Secretary of State of the United States, has the honor to offer to him the assurance of his distinguished consideration.

H. S. Fox.

The Hon. DANIEL WEBSTER,
Secretary of State.

No. 2.

MR. WEBSTER TO MR. FOX.

DEPARTMENT OF STATE,

Washington, April 24, 1841.

The undersigned, Secretary of State of the United States, has the honor to inform Mr. Fox, envoy extraordinary and minister plenipotentiary of her Britannic Majesty, that his note of the 12th of March was received and laid before the President.

Circumstances well known to Mr. Fox have necessarily delayed, for some days, the consideration of that note.

The undersigned has the honor now to say, that it has been fully considered, and that he has been directed by the President to address to Mr. Fox the following reply.

Mr. Fox informs the Government of the United States, that he is instructed to make known to it, that the Government of her Majesty entirely approve the course pursued by him, in his correspondence with Mr. Forsyth, in December last, and the language adopted by him on that occasion; and that that Government have instructed him "again to demand from the Government of the United States, formally, in the name of the British Government, the immediate release of Alexander McLeod;" that "the grounds upon which the British Government make this demand upon the Government of the United States, are these: that the transaction on account of which McLeod has been arrested and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defense of her Majesty's territories, and for the protection of her Majesty's subjects; and that consequently those subjects of her Majesty who engaged in that transaction, were performing an act of public duty for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country."

The President is not certain that he understands, precisely, the meaning intended by her Majesty's Government to be conveyed, by the foregoing instruction.

This doubt has occasioned, with the President, some hesitation; but he inclines to take it for granted that the main purpose of the instruction was, to cause it to be signified to the Government of the United States, that the attack on the steamboat "Caroline" was an act of public force, done by the British colonial authorities, and fully recognised by the Queen's Government at home; and that, consequently, no individual concerned in that transaction can, according to the just principle of the laws of nations, be held personally answerable in the ordinary courts of law, as for a private offence; and that upon this avowal of her Majesty's Government, Alexander McLeod, now imprisoned, on an indictment for murder, alleged to have been committed in that attack, ought to be released, by such proceedings as are usual and are suitable to the case.

The President adopts the conclusion, that nothing more than this could have been intended to be expressed, from the consideration, that her Majesty's Government must be fully aware, that in the United States, as in England, persons confined under judicial process can be released from that confinement only by judicial process. In neither country, as the undersigned supposes, can the arm of the Executive power interfere, directly or forcibly, to release or deliver the prisoner. His discharge must be sought in a manner conformable to the principles of law, and the proceedings of courts of judicature. If an indictment, like that which has been found

against Alexander McLeod, and under circumstances like those which belong to his case, were pending against an individual in one of the courts of England, there is no doubt that the law officer of the crown might enter a *nolle prosequi*, or that the prisoner might cause himself to be brought up on *habeus corpus*, and discharged, if his ground of discharge should be adjudged sufficient, or that he might prove the same facts and insist on the same defence or exemption on his trial.

All these are legal modes of proceeding, well known to the laws and practice of both countries. But the undersigned does not suppose, that if such a case were to arise in England, the power of the Executive Government could be exerted in any more direct manner. Even in the case of ambassadors, and other public ministers, whose right of exemption from arrest is personal, requiring no fact to be ascertained but the mere fact of diplomatic character, and to arrest whom is sometimes made a highly penal offence, if the arrest be actually made, it must be discharged by application to the courts of law.

It is understood that Alexander McLeod is holden as well on civil as on criminal process, for acts alleged to have been done by him, in the attack on the "Caroline;" and his defence, or ground of acquittal, must be the same in both cases. And this strongly illustrates, as the undersigned conceives, the propriety of the foregoing observations; since it is quite clear that the Executive Government cannot interfere to arrest a civil suit, between private parties, in any stage of its progress; but that such suit must go on to its regular judicial termination. If, therefore, any course, different from such as have been now mentioned, was in contemplation of her Majesty's Government, something would seem to have been excepted, from the Government of the United States, as little conformable to the laws and usages of the English Government as to those of the United States, and to which this Government cannot accede.

The Government of the United States, therefore, acting upon the presumption, which it readily adopted, that nothing extraordinary or unusual was expected or requested of it, decided, on the reception of Mr. Fox's note, to take such measures as the occasion and its own duty appeared to require.

In his note to Mr. Fox, of the 26th of December last, Mr. Forsyth, the Secretary of State of the United States, observes, that "if the destruction of the 'Caroline' was a public act, of persons in her Majesty's service, obeying the order of their superior authorities, this fact has not been before communicated to the Government of the United States by a person authorized to make the admission; and it will be for the court which has taken cognizance of the offence with which Mr. McLeod is charged, to decide upon its validity when legally established before it." And adds, "the President deems this to be a proper occasion to remind the Government of her Britannic Majesty, that the case of the 'Caroline' has been long since brought to the attention of her Majesty's principal Secretary of State for Foreign Affairs; who, up to this day, has

not communicated its decision thereupon. And it is hoped that the Government of her Majesty will perceive the importance of no longer leaving the Government of the United States uninformed of its views and intentions upon a subject which has naturally produced much exasperation, and which has led to such grave consequences."

The communication of the fact, that the destruction of the "Caroline" was an act of public force, by the British authorities, being formally made to the Government of the United States, by Mr. Fox's note, the case assumes a decided aspect.

The Government of the United States entertains no doubt that, after this avowal of the transaction, as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilized States, to be holden personally responsible in the ordinary tribunals of law, for their participation in it. And the President presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs, by public means, cannot desire the punishment of individuals, when the act complained of is declared to have been an act of the Government itself.

Soon after the date of Mr. Fox's note, an instruction was given to the Attorney General of the President of the United States, from this Department, by direction of the President, which fully sets forth the opinions of this Government on the subject of McLeod's imprisonment, a copy of which instruction the undersigned has the honor herewith to enclose.

The indictment against McLeod is pending in a State court, but his rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this Government.

He demands immunity from personal responsibility by virtue of the law of nations, and that law in civilized States is to be respected in all courts. None is either so high or so low as to escape from its authority in cases to which its rules and principles apply.

This Department has been regularly informed by his Excellency the Governor of the State of New York, that the Chief Justice of that State was assigned to preside at the hearing and trial of McLeod's case, but that, owing to some error or mistake in the process of summoning the jury, the hearing was necessarily deferred. The President regrets this occurrence, as he has a desire for a speedy disposition of the subject. The council for McLeod have requested authentic evidence of the avowal by the British Government of the attack on and destruction of the "Caroline," as acts done under its authority, and such evidence will be furnished to them by this Department.

It is understood that the indictment has been removed into the Supreme Court of the State by the proper proceeding for that purpose, and that it is now competent for McLeod, by the ordinary process of *habeas corpus*, to bring his case for hearing before that tribunal.

The undersigned hardly needs to assure Mr. Fox, that a tribunal so eminently distinguished for ability and learning as the Supreme Court of the State of New York, may be safely relied upon for the just and impartial administration of the law in this as well as in other cases; and the undersigned repeats the expression of the desire of this Government that no delay may be suffered to take place in these proceedings which can be avoided. Of this desire, Mr. Fox will see evidence in the instructions above referred to.

The undersigned has now to signify to Mr. Fox that the Government of the United States has not changed the opinion which it has heretofore expressed to her Majesty's Government of the character of the act of destroying the "Caroline."

It does not think that that transaction can be justified by any reasonable application or construction of the right of self-defence under the laws of nations. It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a power at peace, nothing less than a clear and absolute necessity can afford ground of justification. Not having up to this time been made acquainted with the views and reasons at length, which have led her Majesty's Government to think the destruction of the "Caroline" justifiable as an act of self-defence, the undersigned, earnestly renewing the remonstrance of this Government against the transaction, abstains for the present from any extended discussion of the question. But it is deemed proper, nevertheless, not to omit to take notice of the general grounds of justification stated by her Majesty's Government in their instructions to Mr. Fox.

Her Majesty's Government have instructed Mr. Fox to say, that they are of opinion that the transaction which terminated in the destruction of the "Caroline," was a justifiable employment of force, for the purpose of defending the British territory from the unprovoked attack of a band of British rebels and American pirates, who, having been "permitted" to arm and organize themselves within the territory of the United States, had actually invaded a portion of the territory of her Majesty.

The President cannot suppose that her Majesty's Government, by the use of these terms, meant to be understood as intimating that these acts, violating the laws of the United States and disturbing the peace of the British territories, were done under any degree of countenance from this Government, or were regarded by it with indifference; or, that under the circumstances of the case, they could have been prevented by the ordinary course of proceeding. Although he regrets that, by using the term "permitted," a possible inference of that kind might be raised, yet such an inference the President is willing to believe would be quite unjust to the intentions of the British Government.

That, on a line of frontier, such as separates the United States from her Britannic Majesty's North American Provinces, a line

long enough to divide the whole of Europe into halves, irregularities, violences, and conflicts should sometimes occur, equally against the will of both Governments, is certainly easily to be supposed. This may be more possible, perhaps, in regard to the United States, without any reproach to their Government, since their institutions entirely discourage the keeping up of large standing armies in time of peace, and their situation happily exempts them from the necessity of maintaining such expensive and dangerous establishments. All that can be expected from either Government, in these cases, is good faith, a sincere desire to preserve peace and do justice, the use of all proper means of prevention, and that if offences cannot, nevertheless, be always prevented, the offenders shall still be justly punished. In all these respects, this Government acknowledges no delinquency in the performance of its duties.

Her Majesty's government are pleased, also, to speak of those American citizens, who took part with persons in Canada, engaged in an insurrection against the British Government, as "American pirates." The undersigned does not admit the propriety or justice of this designation. If citizens of the United States fitted out, or were engaged in fitting out, a military expedition from the United States, intended to act against the British Government in Canada, they were clearly violating the laws of their own country and exposing themselves to the just consequences, which might be inflicted on them, if taken within the British dominions. But notwithstanding this, they were certainly not pirates, nor does the undersigned think that it can advance the purpose of fair and friendly discussion, or hasten the accommodation of national difficulties, so to denominate them. Their offence, whatever it was, had no analogy to cases of piracy. Supposing all that is alleged against them to be true, they were taking a part in what they regarded as civil war, and they were taking part on the side of the rebels. Surely England herself has not regarded persons thus engaged as deserving the appellation which her Majesty's Government bestows on these citizens of the United States.

It is quite notorious that, for the greater part of the last two centuries, subjects of the British Crown have been permitted to engage in foreign wars, both national and civil, and in the latter in every stage of their progress; and yet it has not been imagined that England has at any time allowed her subjects to turn pirates. Indeed in our own times, not only have individual subjects of that Crown gone abroad to engage in civil wars, but we have seen whole regiments openly recruited, embodied, armed, and disciplined in England, with the avowed purpose of aiding a rebellion against a nation with which England was at peace; although it is true that, subsequently, an act of Parliament was passed to prevent transactions so nearly approaching to public war, without license from the Crown.

It may be said that there is a difference between the case of a civil war arising from a disputed succession, or a protracted revolt of a colony against the mother country, and the case of the fresh outbreak, or commencement of a rebellion. The undersigned does

not deny that such distinction may, for certain purposes, be deemed well founded. He admits that a Government called upon to consider its own rights, interests, and duties, when civil wars break out in other countries, may decide on all the circumstances of the particular case upon its own existing stipulations, on probable results, on what its own security requires, and on many other considerations. It may be already bound to assist one party, or it may become bound, if it so chooses, to assist the other, and to meet the consequences of such assistance.

But whether the revolt be recent or long continued, they who join those concerned in it, whatever may be their offence against their own country, or however they may be treated, if taken with arms in their hands in the territory of the Government, against which the standard of revolt is raised, cannot be denominated pirates, without departing from all ordinary use of language in the definition of offences. A cause which has so foul an origin as piracy cannot, in its progress, or by its success, obtain a claim to any degree of respectability or tolerance among nations; and civil wars, therefore, are not understood to have such a commencement.

It is well known to Mr. Fox that authorities of the highest eminence in England, living and dead, have maintained that the general law of nations does not forbid the citizens or subjects of one Government from taking part in the civil commotions of another. There is some reason, indeed, to think that such may be the opinion of her Majesty's Government at the present moment.

The undersigned has made these remarks from the conviction that it is important to regard established distinctions, and to view the acts and offences of individuals in the exactly proper light. But it is not to be inferred that there is, on the part of this Government, any purpose of extenuating, in the slightest degree, the crimes of those persons, citizens of the United States, who have joined in military expeditions against the British Government in Canada. On the contrary, the President directs the undersigned to say that it is his fixed resolution that all such disturbers of the national peace and violators of the laws of their country, shall be brought to exemplary punishment. Nor will the fact that they are instigated and led on to these excesses by British subjects, refugees from the provinces, be deemed any excuse or palliation; although it is well worthy of being remembered that the prime movers of these disturbances on the borders are subjects of the Queen, who come within the territories of the United States, seeking to enlist the sympathies of their citizens, by all the motives which they are able to address to them on account of grievances, real or imaginary. There is no reason to believe that the design of any hostile movement from the United States against Canada has commenced with citizens of the United States. The true origin of such purposes and such enterprises is on the other side of the line. But the President's resolution to prevent these transgressions of the laws is not, on that account, the less strong. It is taken, not only in conformity to his duty under the provisions of exist-

ing laws, but in full consonance with the established principles and practice of this Government.

The Government of the United States has not, from the first, fallen into the doubts, elsewhere entertained, of the true extent of the duties of neutrality. It has held that, however it may have been in less enlightened ages, the just interpretation of the modern law of nations is, that neutral States are bound to be strictly neutral; and that it is a manifest and gross impropriety for individuals to engage in the civil conflicts of other States, and thus to be at war while their Government is at peace. War and peace are high national relations, which can properly be established or changed only by nations themselves.

The United States have thought, also, that the salutary doctrine of non-intervention by one nation with the affairs of others is liable to be essentially impaired if, while Government refrains from interference, interference is still allowed to its subjects, individually or in masses. It may happen, indeed, that persons choose to leave their country, emigrate to other regions, and settle themselves on uncultivated lands, in territories belonging to other States. This cannot be prevented by Governments, which allow the emigration of their subjects and citizens; and such persons, having voluntarily abandoned their own country, have no longer claim to its protection, nor is it longer responsible for their acts. Such cases, therefore, if they occur, show no abandonment of the duty of neutrality.

The Government of the United States has not considered it as sufficient to confine the duties of neutrality and non-interference to the case of Governments whose territories lie adjacent to each other. The application of the principle may be more necessary in such cases, but the principle itself they regard as being the same, if those territories be divided by half the globe. The rule is founded in the impropriety and danger of allowing individuals to make war on their own authority, or, by mingling themselves in the beligerent operations of other nations, to run the hazard of counteracting the policy, or embroiling the relations of their own Government. And the United States have been the first among civilized nations to enforce the observance of this just rule of neutrality and peace, by special and adequate legal enactments. In the infancy of this Government, on the breaking out of the European wars, which had their origin in the French Revolution, Congress passed laws with severe penalties for preventing the citizens of the United States from taking part in those hostilities.

By these laws, it prescribed to the citizens of the United States what it understood to be their duty, as neutrals, by the law of nations, and the duty, also, which they owed to the interest and honor of their own country.

At a subsequent period, when the American colonies of an European Power took up arms against their sovereign, Congress, not diverted from the established system of the Government, by any temporary considerations, not swerved from its sense of justice, and of duty, by any sympathies which it might naturally feel for one of the parties, did not hesitate, also, to pass acts applicable

to the case of colonial insurrection and civil war. And these provisions of law have been continued, revised, amended, and are in full force at the present moment. Nor have they been a dead letter, as it is well known that exemplary punishments have been inflicted on those who have transgressed them. It is known, indeed, that heavy penalties have fallen on individuals, citizens of the United States, engaged in this very disturbance in Canada, with which the destruction of the "Caroline" was connected. And it is in Mr. Fox's knowledge, also, that the act of Congress of 10th March, 1838, was passed for the precise purpose of more effectually restraining military enterprises, from the United States into the British provinces, by authorizing the use of the most sure and decisive preventive means. The undersigned may add, that it stands on the admission of very high British authority, that during the recent Canadian troubles, although bodies of adventurers appeared on the border, making it necessary for the people of Canada to keep themselves in a state prepared for self-defence, yet that these adventurers were acting by no means in accordance with the feeling of the great mass of the American people, or of the Government of the United States.

This Government, therefore, not only holds itself above reproach in everything respecting the preservation of neutrality, the observance of the principle of non-intervention, and the strictest conformity, in these respects, to the rules of international law, but it doubts not that the world will do it the justice to acknowledge, that it has set an example, not unfit to be followed by others, and that by its steady legislation, on this most important subject, it has done something to promote peace and good neighborhood among nations, and to advance the civilization of mankind.

The undersigned trusts, that when her Britannic Majesty's Government shall present the grounds, at length, on which they justify the local authorities of Canada, in attacking and destroying the "Caroline," they will consider that the laws of the United States are such as the undersigned has now represented them, and that the Government of the United States has always manifested a sincere disposition to see those laws effectually and impartially administered. If there have been cases in which individuals, justly obnoxious to punishment, have escaped, this is no more than happens in regard to other laws.

Under these circumstances, and under those immediately connected with the transaction itself, it will be for her Majesty's Government to show upon what state of facts, and what rules of national law, the destruction of the "Caroline" is to be defended. It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remon-

strance to the persons on board the "Caroline," was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of the United States cannot believe to have existed.

All will see that if such things be allowed to occur, they must lead to bloody and exasperated war. And when an individual comes into the United States from Canada, and to the very place on which this drama was performed, and there chooses to make public and vain-glorious boast of the part he acted in it, it is hardly wonderful that great excitement should be created, and some degree of commotion arise.

This republic does not wish to disturb the tranquility of the world. Its object is peace, its policy peace. It seeks no aggrandizement by foreign conquest, because it knows that no foreign acquisitions could augment its power and importance so rapidly as they are already advancing by its own natural growth, under the propitious circumstances of its situation. But it cannot admit that its government has not both the will and the power to preserve its own neutrality, and to enforce the observance of its own laws upon its own citizens. It is jealous of its rights, and among others, and most especially, of the right of the absolute immunity of its territory against aggression from abroad; and these rights it is the duty and determination of this government fully, and at all times, to maintain, while it will at the same time as scrupulously refrain from infringing on the rights of others.

The President instructs the undersigned to say, in conclusion, that he confidently trusts that this, and all other questions of difference between the two governments, will be treated by both in the full exercise of such a spirit of candor, justice, and mutual respect, as shall give assurance of the long continuance of peace between the two countries.

The undersigned avails himself of this opportunity to assure Mr. Fox of his high consideration.

DANIEL WEBSTER.

HENRY S. FOX, Esq.,

Envoy Extraordinary and Minister Plenipotentiary.

THE TRIAL OF STEPHEN M. BALLEW FOR THE MURDER OF JAMES P. GOLDEN, MCKINNEY, TEXAS, 1871.

THE NARRATIVE.

Stephen M. Ballew was a native of Kentucky, where he had become acquainted with John W. Golden, whose home was in Quincy, Ill., when the latter visited some relatives in Kentucky. A few years afterwards Ballew one day called at the Golden's and renewed the acquaintance. He told Golden that he was in the business of selling horses and mules and won his confidence to such an extent that he was invited to live with the family. He remained there for several months, during which time he had made himself so popular that he induced Mr. Golden to send four of his own horses with a drove which Ballew told him he was going to take to the South to sell. A number of letters were received by the family while he was in the South, in which he praised the country and its opportunities for making money, and several of the letters written to James P. Golden, an elder son, strongly advised him to come down there with him and make his fortune. But when Ballew got back he brought with him a tale of bad luck in his adventure; that one of the horses had died and for the others he had been compelled to take notes with good security, and he not only induced Mr. Golden, Sr., to take his note for the debt but to lend him considerable money for a new adventure in the South, in which he persuaded James to go with him as a partner and to advance several thousand dollars for the purchase of live stock. All being settled, Ballew and James left the Golden house with a horse and wagon and a large trunk, on the expedition which was to bring fortune to the family.

Letters filled with glowing accounts of their success came from time to time to the expectant family, but several months

later Ballew returned to the Golden house alone, telling the family that he had left James in Texas to close up the business and that he would be home soon. He was allowed to make his home with the Golden family and in a short time married one of the daughters. But to all inquiries as to what had become of the son he gave evasive answers; sometimes pretending to have heard from him and sometimes that he was searching for him and had employed detectives to look him up. Finally old Golden lost patience and brought suit for the money Ballew owed him and when it was discovered that Ballew had brought back with him most of the clothing that had belonged to James, people began to suspect that he knew something of the disappearance, and eventually he was arrested in Quincy, Ill., and charged with the murder of young Golden.

A long preliminary examination was held, but the body had not been found and the chance of holding him was small, when one day the news came that a corpse had been accidentally discovered hidden in the ground near a place in Texas where Ballew and Golden had camped one night. The remains were identified as those of young Golden. The Governor of Texas asked his extradition, which was granted, and after a long trial there Ballew was convicted and hanged.

THE TRIAL.¹

*In the District Court of Collin County, McKinney, Texas,
November, 1871.*

HON. W. H. ANDREWS, *Judge.*

Quincy, Ill., February 14.

This morning, in the City of Quincy, Illinois, the preliminary examination before Justice Barker of Stephen M. Ballew, charged with the murder of James P. Golden in the State of Texas, began. The proceedings were to determine whether the prisoner should be held in custody to await a requisition from the Governor of Texas, and lasted for several days.

¹ *Bibliography.* "The Climax in Crime of the Nineteenth Century, being an Authentic History of the Trial, Conviction and Execution of Stephen Merris Ballew, for the Murder of James P. Golden, in Collin County, Texas, on the 21st day of October, 1870,

February 16.

Mr. Ewing, State's Attorney (Illinois), said that all the evidence available on the part of the prosecution had been introduced, and that the counsel for the People were unwilling to have the case decided until they have an opportunity to produce witnesses to supply the proof of the death of James P. Golden in Texas. He expected in a short time to obtain news of the finding of the body, and that he would be able to obtain testimony that Ballew was guilty of the crime charged against him. He moved a continuation of the examination until Saturday, the 25th instant, which was granted by the COURT.

Quincy, Ill., February 25.

The preliminary examination of Stephen M. Ballew, charged with the murder of James P. Golden, was continued today before Justice BARKER. *Mr. Ewing* said that since the adjournment of the examination on the 16th instant, the Circuit Court had been in session, and the Grand Jury had found seven indictments against Ballew, the defendant, charging him with larceny and swindling, and that he was now in the hands of the law of this State, if this examination was continued, whatever action might be taken by the examining court or the Governor of Texas, would not affect the

with a Short Sketch of the Early Life of the Murderer. By J. H. Dudley. Quincy, February 28, 1872."

A second title page gives a picture of the murderer, who is described as "The Inhuman Murderer; the Expert Confidence Operator and the Monster Liar of His Age." The pamphlet, which contains a full report of the trial, has a somewhat lengthy sketch of the murderer. Stephen Merris Ballew, it says, was born in Pendleton County, Ky., about 1843. His father, Madison Ballew, stood well in the community where they lived. His mother died when Stephen was about six years old; he and his sister Belle were placed in charge of Mrs. Margaret Caldwell, a sister of John W. and S. M. Golden; they were in a destitute situation. Mrs. Caldwell kept them but a short time, but, short as it was, it no doubt gave rise to the intimacy with John W. Golden and family that proved so ruinous in the end. His father having married again, and not bearing the restraint of a stepmother, he roamed about the neighborhood, never staying long at any one place, and grew up under no restraint. He was fond of reading exciting tales, such as the daring deeds of desperadoes, remarkable trials and confessions, and everything of that character that fell into his hands he would peruse with the utmost avidity to the exclusion of everything else. While reading such narratives, he no doubt formed a resolution to imitate, or excel, the characters therein represented. His mind was thus occupied up to the age of seventeen, when the rebellion broke out, that event giving him the first start in crime. He went into the rebel service, under Humphrey Marshall, was transferred to General Morgan's command, and at the end of the war returned to Kentucky.

position of the defendant here if he should be committed upon the charge of murder, the authorities of this State would not deliver him up even upon a requisition, until the indictments pending in this State were tried. It appeared to him unnecessary at present to take up any more time in the investigation of the charge of murder, and in consideration of the circumstances, would dismiss the case.

John Williams, for the prisoner, denied the right of *Mr. Ewing* to dismiss on the ground that he was not State's Attorney of Texas, and had no more authority over the case than the counsel for the defense; he demanded that the Court require the prosecution to file a bond for costs in pursuance of the statute, and insisted that the Court discharge the defendant on the evidence introduced. The right to dismiss was argued at length by *Mr. Ewing*, for the People. The Court required a bond to be filed to secure the payment of the costs incurred and permitted the prosecution to dismiss.

Ballew was then committed to jail upon the seven indictments pending against him in the Circuit Court.

February 26.

Stephen M. Ballew was arraigned for trial on the seven indictments; three of the indictments charge the practice of the confidence game, one charge of forgery, and three of larceny. The Court fixed the bail in each case at \$2,000. Failing to procure the requisite bail, his attorneys made application for a change of venue and affidavits were offered, based upon the prejudices of the people.

The COURT, after argument, ordered the cases to Hancock County for trial, on the 11th of March. *Ballew* was conveyed to the Hancock County Jail and locked up to await the March term of the Circuit Court of that county.

In the early part of the March term of the Circuit Court of Hancock County, which had convened on Monday, the 13th, a demand was made by the defense for a trial on the indictments above mentioned. *Mr. Ewing* asked for and obtained a continuance to the June term. Meanwhile, news arrived in Quincy that the body of *Golden* had been found and *Mr. Ewing* at once started for Texas, arriving there on March 23, the Texas Grand Jury having found an indictment against *Ballew* for murder in the first degree.

Mr. Ewing next visited Austin, the capital of the State, and obtained of *Edward J. Davis*, Governor of the State of Texas, a requisition upon the Governor of the State of Illinois, for the body of *S. M. Ballew*. *Mr. Ewing* returned to Quincy in the latter part of the month of April, bringing with him the remains of young *Golden*, and such other articles and effects as could be stowed in a large trunk, the same trunk that young *Golden* carried away from home on his trip to Texas. The Governor of Illinois granted the requisition.

June 3, 1871.

Capt. W. N. Bush, Sheriff of Collin County, Texas, arrived today in Quincy, specially commissioned with the duty of transferring *Ballew* from Illinois to Texas.

June 6.

The Circuit Court of Hancock County met today, and under the indictments found by the Grand Jury of Adams County, against S. M. Ballew, Mr. Ewing appeared as Prosecuting Attorney for the People, and formally dismissed the indictments in that court. The prisoner was then handed over to Capt. Bush, who on the 7th of June, started with his prisoner for Texas.

McKinney, Texas, July 23.

Today, Sunday, the prisoners effected their escape from the county jail, there being four, including Ballew, confined. The jail was unguarded at the time, making the building easy of approach by designing persons. Taking advantage of that circumstance, and the quiet of the town, the inmates of the jail were furnished with a handspike formed in the shape of a crowbar at the end, and made of Bois d'Arc wood, a timber indigenous to that climate, and almost as hard as iron. With that the prisoners wrenched the door from its hinges and made their escape. The cry of a jail delivery soon spread through the town, and immediately the citizens were in pursuit, and in the course of two hours three of the escaped prisoners were secured. Ballew was forced to submit to the humiliation of being recaptured in a large corn field by a mere boy of fifteen or sixteen years old, and marched back to prison before the muzzle of a double-barreled shotgun.

July 24.

Today the case of Stephen M. Ballew was called.

Luchs F. Smith, District Attorney, and W. G. Ewing,² for the State.

J. W. Throckmorton, Thomas J. Brown and Russell De Armond, for the prisoner.

A continuance was asked for on the plea of important wit-

² EWING, WILLIAM G. Born McLean County, Ill. Educated Illinois Wesleyan University, Bloomington. Taught school in Kentucky and studied law. Admitted to bar 1860 and practiced about one year in Kentucky, then removed to Woodford County, Ill., and practiced there for 18 months. Removed to Quincy 1863, City Attorney 1865, State's Attorney for Adams and Hancock Counties 1868-1872. Later removed to Chicago. United States District Attorney, Chicago, 1890. Judge Superior Court, Cook County, 1892-98.

nesses being absent, and upon the requisite affidavit being filed, the Court granted the continuance to the November term of the District Court.

November 27.

The Court stated that this was the day set for the trial of the case of The State of Texas v. Stephen M. Ballew, charged with the murder of James P. Golden, and asked if the counsel for the State were ready for trial. The *District Attorney* announced that the State was ready. *Mr. Brown* stated that the prisoner was ready.

The prisoner was brought into the court room and took a seat beside his counsel. The Court ordered that the counsel proceed to select a jury. The *venire* was called and each one questioned by District Attorney *Smith* touching his qualification to serve as a juror. The day was consumed in getting the jury, and out of one hundred and thirty men called in and examined, the following were selected as a jury: Aaron Bryant, Noah H. Hubbard, Martin W. Gentry, John T. Mourland, James B. Franklin, J. L. Kerr, M. R. Clark, James P. Duncan, Wm. C. Mayfield, Benjamin S. King, Henry S. Taylor, Grafton Williams. After being sworn and cautioned by the COURT to refrain from any conversation with regard to the case, they were taken in charge by the Sheriff and the court adjourned.

JUDGE ANDREWS notified the attorneys and officers of the court to open the court in the Christian Church, as that was the largest room in the town, the court room being too small.

November 28.

The court met in the Christian Church at 9 o'clock. The room, 40 by 80 feet, was crowded. The jury were called and answered to their names. The indictment was then read. It was the common form of an indictment for murder, containing two counts.^a

^a In the name, and by the authority of the State of Texas, the Grand Jurors for the State of Texas, duly impanelled, charged and sworn to inquire into, and a true presentment make, of all offenses committed in the County of Collin, upon their oath, present in the District Court for said county and State, that Stephen M. Ballew,

John W. Golden. Resided in Adams County, Ill., 30 years; James P. Golden was my son, and lived with me up to last September. He would have been 28 last November; he always lived with me and worked on the farm. Am acquainted with prisoner, Ballew; saw him first 11 years ago in Kentucky; next about six years ago. He came to my house and stayed about one week; said he was going to Missouri. Next after that about three years ago he and a man named Moore came to my house from Missouri; he said he was trading in stock. Did not see him again until February two years now; met him there in Quincy. Next saw him some time last fall one year ago. He came to my house from Kentucky; he talked about having

bought hogs in Missouri, and sold them again, and said he made large profits. Wanted to know what I would charge to keep him and two horses through the winter; told him I did not know, as I never done that kind of business. He went away, and came back afterwards. He told me he had some contracts for horses in the South, and that I had two horses he thought would fill the contract, except color. Said he had contracted with a man named Williams. Agreed to let him take four horses of mine south. Talked about me or my son going on that trip. He left with the horses in February, one year ago. I accompanied him to Quincy; he said he would be back in June and bring the money back, or express it. The horses were two stal-

late of said county and State, on the 21st day of October, in the year of our Lord, one thousand eight hundred and seventy, with force and arms, in the County of Collin, and State aforesaid, did, in and upon the person of one James P. Golden, unlawfully, feloniously, willfully, and of his malice aforethought, make an assault; and that the said Stephen M. Ballew, a certain gun, the same being then and there a deadly weapon, charged with gunpowder and leaden ball, which said gun he, the said Stephen M. Ballew, in his hands then and there had and held, then and there unlawfully feloniously, willfully and of his malice aforethought did discharge and shoot off, at, to, against and upon the said James P. Golden, and the said Stephen M. Ballew, with the leaden ball aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Stephen M. Ballew discharged and shot off as aforesaid, then and there unlawfully, feloniously, willfully and of his malice aforethought, did strike, penetrate and wound him, the said James P. Golden in and upon the head of him, the said James P. Golden, giving to him, the said James P. Golden, then and there, with the leaden ball aforesaid, discharged and shot out of the gun aforesaid, by the said Stephen M. Ballew, in and upon the head of him, the said James P. Golden, one mortal wound of the depth of five inches, and of the breadth of one-half an inch, of which said mortal wound the said James P. Golden did then and there die. And so the Grand Jurors aforesaid, upon their oath aforesaid, do say that the said Stephen M. Ballew, him, the said James P. Golden, in the manner and by the means aforesaid,

lions, a yellow and a roan, and mare and gelding, one a sorrel, the other a bay; the best stallion was worth \$350 or \$400, the other \$250 or \$300; the other two were worth \$225 and \$175. He was to take the horses to Shreveport, La.; he said it ought to be worth 10 per cent commission. I heard from him first after he left, by letter, from St. Louis; have the letter here. When he came back he told me he sold three of the horses for \$1,080; the other died at Cape Girardeau, Mo., on their way down; he said the horses were insured in a St. Louis company for \$800; he said he sold the horses on credit, with good security; that when he got there stock was low and dull; he thought he could make better profit on credit; said at first

when he came back that he could get the insurance on the dead horse, he supposed; said afterwards that owing to some informality in the policy he did not get the money; said he had some kind of a suit and got beat; said he had a lot of mules, 27 of them died on the trip; that they were insured, and he got the money on them. He got back some time in May, 1870; did not bring any money with him; said he would do what was right about it; said he and his partner, Nathaniel J. Dougherty, took 227 mules and 17 horses south. He afterwards had a settlement with me; he allowed me \$1,500 for the four horses and shot gun I let him have. He said it was his fault that the insurance was lost. Told him I did not make any charge for the dead horse;

unlawfully, feloniously, willfully and of his malice aforethought, did kill and murder, against the peace and dignity of the State.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present in the District Court for said county and State, that the said Stephen M. Ballew, on the 21st day of October, 1870, in the county and State aforesaid, in and upon the person of the said James P. Golden, did unlawfully, feloniously, willfully, and of his malice aforethought, make an assault, and that the said Stephen M. Ballew, with a certain heavy instrument, to the Grand Jurors aforesaid unknown, the same being then and there a deadly weapon, which said heavy instrument he, the said Stephen M. Ballew, in his hands then and there had and held, then and there unlawfully, feloniously, willfully and of his malice aforethought, did strike, beat, wound and bruise him, the said James P. Golden in and upon the head and forehead of him, the said James P. Golden, giving to him, the said James P. Golden, then and there, with the heavy instrument aforesaid, one mortal wound which fractured the skull of him, the said James P. Golden, of which said mortal wound the said James P. Golden did then and there die. And so the Grand Jury aforesaid, upon their oath aforesaid, do say that the said Stephen M. Ballew did kill and murder James P. Golden in the manner and by the means aforesaid, unlawfully, feloniously, willfully and of his malice aforethought, against the peace and dignity of the State.

JOSIAH NICHOLS,

Foreman of the Grand Jury.

he gave me his note for \$1,500 just before he started south the last time. My son, James P. Golden, went with him on the last trip, on the 13th September last. He told me my son could make as much on the trip as he could farming three or four years; he said he had made a great deal of money himself on previous trips. After he came back from his first trip south he told me a man named N. J. Dougherty took sick at St. Louis, and kept sick until they got to Camden, Arkansas, where he died; that he (Ballew) was left by Dougherty about \$9,500, by will, the amount left after the debts were paid; read me what purported to be Dougherty's will. Just before he started away, last September, he told me he had the \$9,500; this was before any notes were executed between us. He said he had 211 Texas steers over at Poindexter's, in Missouri, and herded there; that he sold them for \$4.40 per hundred pounds; that the steers averaged 1,112 pounds each. He told me he owned a lot of land near Baxter's Springs, Kansas, and twenty acres near Shelbina, Mo., and had some ponies and yearling steers over in Missouri. Said he had money in the bank at LaGrange, Mo.; that he let Ezra A. Dougherty have some money from the LaGrange bank to pay on a note held against Dougherty by the First National Bank of Quincy; the amount was \$1,500; they exchanged checks in some way. He told my son James that he would furnish the means if my son would go with him; that he should be a full partner in all that was made;

there was an article of agreement between them. I have not seen it since, and do not know where it is. The agreement was that my son was to pay him interest, if they had luck, on one-half of the money invested; Ballew to furnish the means. He said he had a lot of money owing to him, besides the proceeds of his cattle; that he had borrowed \$7,000 of Ezra A. Dougherty, near Shelbina, Mo., and had the \$9,500 from the deceased Dougherty's estate. He said he had purchased \$22,000 worth of goods in St. Louis, and had shipped them south. He wanted my son to go with him as a partner and help to attend to the business, and get one-half of the profits, in return my son to pay him interest on one-half invested. My son went with him; I came as far as this city, on the way; when we got here my son asked me to go to Wheat's office to have some notes and deed of trust executed; the deed of trust was for \$2,000, upon 60 acres of land belonging to my son, to secure \$2,000 of the borrowed money from Dougherty. Then I was to sign a note for \$5,000, with my son, to secure the remaining \$5,000 of the \$7,000 borrowed; we went to Wheat's office, where they were drawn up; Ballew was with my son when he asked me to go to Wheat's office. Ballew told me, after they were executed, that he did not know that James was going to give him the notes and deed. Told him that if I had the notes to pay it would ruin me. I do not recollect who first asked me to sign the note. My son had an outfit of two horses and a wagon, set of new harness,

about \$400 in money; he took a horse and mare, both peculiar; the horse is what some would call a "double-jointed" horse; the wagon was a new one, made by Rogers of this city. He took some clothing with him, and a pair of extra boots. (The witness was here shown a pair of boots.) I have seen these boots several times before. Believe they belonged to my son; got them myself, out of a shop on Hampshire street in Quincy, upstairs; my son wore them to Kentucky last fall and took them with him on the trip south. I saw the boots after Ballew came back, at Mr. Jacobs' clothing store; he took them out of his trunk and showed them to me, and asked me if they were not good enough to get married in? Told him I thought so. He then sent them to get half-soled. Ballew came back November 18; my son did not come back with him. He never has come back. Ballew said, at first, that he left my son at Jefferson, Texas; afterwards told me he left him at Shreveport, La. He said he parted with him the last night in October, and that he (Ballew) went from there about 150 miles in the country to attend a horse sale. Expected my son home about the middle of November. Ballew said when he went away he did not know when he would be back; it might be one year. Said when he came home he expected to find James at home; that my son had \$18,500 in his hands; he said he had \$900 of his money to furnish Ballew's house and a large sum to pay off his indebtedness in Missouri; said he had \$1,500 to pay off the note I held against Ballew, and \$2,500

as a loan to me. Said he (Ballew) brought \$11,000 home with him, and that he sold \$350 in gold to the First National Bank here, and deposited \$5,000. Said he paid a man in Baxter Springs several thousand dollars of borrowed money. He said my son would certainly be at home in a few days; he afterwards said it might be a year; and then again he said it might be a year and a half; he said there was dissension between James and his sisters about a young lady, and that was the cause of his absence. He said Jim had his money, and did not think that he would have done it. He did not want any notoriety made of the affair, and said it had better be kept in the family. He was engaged to be married to my daughter before he went away, and was married shortly after he came back; 1st day of December. Said he did not want any publicity made of it. He said that he and I could buy stock and trade out of the trouble. Said he had paid a policeman \$300 to hunt him up, and all the police in the principal cities knew all about it. He expected to hear of him through them. He stayed at my house, but went to Missouri one time, he said, to the State meeting of the fraternity, which led me to believe it was a meeting of Freemasons. After he had been to Missouri I asked about a report that he had said that he had seen my son in Missouri. Told him that a man named McGuire and another by the name of Scribner had told me that he (Ballew) said that he had seen my son on the Missouri River, and helped him roach and brand some mules. Ballew said that

he had not told any such thing. Told him that he ought to have come to me instead of going to others. He said he did not go to them. Told him I thought I ought to have been the first man that he should tell if he had seen my son. Ballew made no reply. The last letter I got from my son was dated October 31, at Shreveport; the last letters before that was about the 15th, 16th or 17th of October, mailed at McKinney, Texas; there were three of them. There was a young lady—Miss Smith—whom my son waited upon before he went away; she lived in Hancock County in this State. Ballew, some time after his return, appeared uneasy about my son, and said he would go up and see Miss Smith to find out when she had heard from him. When he came back he told me that Miss Smith had a letter from my son, dated November 12, as near as he could make out, mailed in Colorado; said he saw the envelope, did not see the letter. He brought back an oilcloth overcoat and a pair of socks that my son took away with him. My son took the deed to his farm with him; the deed was found in Ballew's trunk. My son executed a note to Ballew for \$2,000; I and my son a note for \$5,000, as before stated. After he came back I gave my note for \$2,500, and gave him up his note for \$1,500, which he had given me for the horses. After he came home he told me he had given my son \$2,500 to bring home as a loan to me, and \$1,500 to pay off the note the gave me for the horses. He afterwards asked me and I gave him my note for \$2,500, which he said he gave

my son for me. When arrested for obtaining the notes under false pretense, he gave me back the \$2,500 and \$5,000 notes. He said after he came back that he took \$5,000, deposited in the First National Bank of this city and then borrowed \$2,000 of a friend in Missouri, the time he went to attend a meeting of the fraternity, and paid off the \$7,000 note for the borrowed money of Dougherty. He told me, after he returned from the South, that he had deposited \$5,000 and \$2,000 notes with Dougherty as collateral security for the loan of the \$7,000; that Dougherty needed the money, and had disposed of the notes at the bank, and that he (Ballew) had taken his \$5,000 and borrowed \$2,000 and settled for both notes; that he had saved \$1,500 by the operation.

On the trip south Ballew said he and my son started to Texas by the overland route; they expected to go by the way of Baxter Springs, Kansas, through the Indian territory into northern Texas, then to Quitman and Jefferson; Ballew told me after his return, when they got to Ezra A. Dougherty's he let them take a shot gun with them on the trip. He first said he did not know what became of it, but told me afterward that my son took the barrel out of the stock and put them in his trunk. The deed to my son's 60 acres of land upon which the trust deed was executed, was found in Ballew's trunk after he was arrested. Do not know how my son came to take it with him, and soon after Ballew came back he told me that my son had all his own and Ballew's papers in his trunk.

After Ballew came back, told him that I would like to have my son hunted up; he said that he had employed a detective of St. Louis to hunt him up, and that he, the detective, would employ all the chief detectives in the country, and that he expected to hear from him soon; told him McGraw was very successful, I would like to have him employed; he said he did not get McGraw because he was such a rascal. The black cloth pants shown me have seen before; do not know whether they were my son's or not; Ballew had them when he came back, and said they were his; there were several rents in them; he told me he tore them on the briars while shooting turkeys in Texas; the rents have been sewed up since.

Cross-examined. Cannot tell whether there are other letters or not that have come into my hands within the year past, from either Ballew or my son, besides these introduced here. There were more letters that came into the family; I do not know where they are now; some of the letters read here were in the possession of my daughter, Ballew's wife; some of the letters introduced were found in his trunk after the arrest. First time I saw the trunk was at Mr. Jacobs' clothing store, in this city, after Ballew came back. When they started south my son had a large trunk which was bought at Jacobs'; he and Ballew had but the one trunk when they left; think they put their clothes in that trunk together; think they both used it; Ballew did not bring back that trunk with him. When they left, my son expected to be gone until the middle

of November; Ballew said he might be gone a year. The first talk about the co-partnership between them that I know of, was at my house. A short time before they left there was an article of agreement between them. My son furnished an outfit, wagon harness, and team. Ballew came back on the 18th of November and was married about the 1st of December. After he came back he showed me an order, or receipt, from my son; the receipt is in my son's handwriting, all except the "1," 1870, in the date of it, that is not my son's. There was an understanding when they went away that Ballew was to send me some money after he got down there. I gave my note for the \$2,500 the receipt called for. Ballew took the note that has been taken up. There was a note of \$2,000 executed by my son to Ballew and secured by a deed of trust. Do not know where the note and deed of trust are now; saw the deed some time since at the police station, I think; don't believe I have had possession of the note or deed since they were executed. The note and trust deed were taken away by Ballew when they started for Texas. Is my recollection that both my son and Ballew asked me to sign the notes. My son stated that the consideration for the notes was that Ballew was furnishing all the capital, and the notes were to secure the \$7,000 borrowed from Dougherty. Ballew said he had bought in St. Louis \$22,000 worth of goods, which were to be shipped south. Got a letter from my son, in which he spoke of the profits they were making out of the trip.

I did not oppose my son's marrying Miss Smith. Had no words with him about it when he went away; we talked the matter over and I told him to do as he pleased; there may have been some trouble between my son and some of the members of the family; do not know what it was. Ballew and my son took with them from home only the one trunk. My son had these same boots shown here with him then. I got the boots from a store on Hampshire street. Ballew was arrested because I wanted to get the notes back, the \$5,000 and \$2,000 notes; did not want to be broken up in my old age. I got back the \$2,500, note and Ballew ordered my name erased from the \$5,000 note. Did not give the note freely; I thought it would be the best thing I could do, considering the fix I was in, Did not believe that my son ever got the money before they went away. Ballew spoke of sending the money to me; wanted him to send it by express. He said it would cost too much; that the expressage from Shreveport would cost \$200; that the express was robbed so often that it was more dangerous than to carry it. He said he would send the money by my son. My son was young, and I did not want it sent that way. Mr. McGraw opened Ballew's trunk. Saw him take out some papers; when the trunk was opened Mr. Ewing, brother Stephen and myself were present. Do not know where the papers are; the boots were not in the trunk.

Re-examined. Think when my son and Ballew left, Ballew had a pair of saddle bags; he brought a pair back with him when he

returned from Texas. Ballew had on a pair of fine boots badly run over at the sides, and his toes sticking out; asked him if he was going to get a new pair; he said he would get a pair somewhere on the road; these boots here my son carried away in his trunk. Have not seen the trunk my son took away with him; the trunk in Ballew's possession is not the trunk my son took away. The accused came back from his trip south, on 18th November, 1870; my son has never come back; last time I saw him alive was in Quincy, Ill., when he and accused were starting south, about the 13th of September, 1870; I and my family received letters from him regularly until he reached McKinney, in Collin County, Texas. The last genuine letter ever received from him was dated at McKinney, Texas, October 18, 1870; this letter was mailed at McKinney, October 20. Have seen the remains of my son; the first time I saw them was in Quincy, while in the possession of Mr. Ewing; my son had a decayed tooth; it was a double tooth; was on the left side and in the upper jaw; he also had a decay in one of his front teeth; described the teeth to Mr. Ewing when he was first starting to Texas to hunt the remains of my son; the skull of my son favored the shape of his mother's much more than it did mine. (Here the skull and bones were shown to the witness and found to be as he had described them.) I know this is the skull of my son, James P. Golden, who started away with the prisoner, Stephen M. Ballew. (The clothing found on the remains was shown and

identified as that worn and taken by his son.) My son had two knives, one a pocket knife with six or eight blades, the other was a kind of dagger—two-edged knife, which had a fracture in the handle; my son got the handle mended; I would know the knives if I saw them. (Here two knives were shown witness.) Recognize these knives; they belonged to my son; he took them away with him when he started south. I have not seen the knives since my son left, until now. My son took away a trunk (trunk shown witness); that looks like the trunk my son took away with him; the trunk my son took away had several departments in it; there was a place for a hat. (Trunk opened and found to be arranged as stated by witness.) Have not seen the trunk since my son left until I saw it in Quincy in possession of Mr. Ewing. When accused came back without my son he said that James had taken the trunk and all their papers with him.

November 29.

John W. Golden. After Ballew had circulated the report about seeing my son in Missouri, about which I testified on yesterday, he seemed to get very uneasy about my son. The boots here in court I saw Ballew take out of a trunk which he said he bought from Jacobs' store in Quincy; he told me he got the boots out of a case of boots he bought in St. Louis to ship south; said he bought boots, dry goods, ready-made clothing, whiskey, groceries, etc., to ship south. Accused brought back with him from the trip that my son accompanied him, an oil cloth over-

coat that belonged to my son, and which he took away (coat shown witness); that looks very much like the oil cloth coat that my son took south with him; the accused also brought home some socks, handkerchiefs and shirts that belonged to my son, and which he took along on the trip; my son took the deed to his farm with him. The deed was found in the prisoner's trunk after he came back. That is the deed my son took away, and the one Ballew had in his trunk when he came back from off the trip. My son had executed a note to Ballew for \$2,000, and gave him a deed of trust on his land to secure the note; do not know how it came that my son took the deed to his land with him; he had the most implicit confidence in Ballew. Have seen one of the animals that the accused took south for me on his trip before my son went with him; she is one of the animals that Ballew told me he had sold in Shreveport, La., on time, with good security, and which he would collect when he and my son went down. Ballew brought back two pair of pants on his return from the trip on which my son accompanied him; one pair was black doeskin; they were torn considerably; they looked as if they had been torn by briars; noticed blood on them; Ballew said it was liniment, and got them washed at my house; he said the way he got them torn as they were was that he shot a turkey down in Texas and was running through the briars and brush after it. These are the boots my son wore away from home. My son chewed tobacco. His hair was dark. The hair found on the remains re-

sembled the color of my son's hair. My son oiled his hair sometimes and when oiled it was darker than when it was not. (Shown a brown hat.) That looks like the hat my son took away with him; Ballew brought home such a hat in texture and color, but then I think the brim was a little wider than on this one. (Another hat shown.) That

is the hat Ballew wore back home from his trip south with my son. Am acquainted with the handwriting of prisoner. This letter is in his handwriting and was received by son James. (Many other letters were handed to witness and identified as being in the handwriting of Ballew and read in evidence. The letters are given here just as written.)

Shelbina, Mo., Sept. the 1, 1870.

John Bowman

Dear friend. I have just got home from Ky—and when I got to cousin E A Dougharty I found the long looked for letter there. the first I have herd from the family since I left there. John I have come to the conclusion that you had tied yourself to some one of the fare Daughters of Texas—and did not care to know or hear from eny one else—if you have I sopose the spell has past off to some xtent. at least you have taken time to think of me well I have no nuse to write you ondy that I am getting ready to start to texas I shall start by the 15 of this month will be at Uncles the 15 of Oct—John tell Cuts to put Babe in fine fixe by that time and I will pay him for ite and I want you to go to Sweveport with me when I come look round and see if there is eny mules that I can by or good horses dont forget you must go to Sweveport when I come I have a fine stallion that came from Canidia he is a thoro bred Canidianian and is a horse of power and stringht I think he will take well in your country . . . compliments to your fathers family with due respect

S. M. Ballew

Mr. Ewing. Mr. Golden, state whether or not at the time the above letter was written, your son James had agreed to go with Ballew to Texas? He had, and was preparing for the trip; when my son and daughter and Ballew got back from Kentucky,

which was the last of August, 1870, the agreement was made and my son was to purchase wagon, harness, horses, etc., while Ballew went over to Missouri to settle up some business, as he said.

South mo sept 25. 1870

Dear Sister I am resting quite well hope you are well and bin well—sister the trip south is promisin and I hope to be able to settle you in a quiet home on my return be cheerful and i will do my best at all times to make something to take care of you in a short time I will rite you as often as I can on the trip dont be oneasy about me for I have traveled on bisness for some time and I dont think there is eny-more danger on this trip than any other

. . . write me all the nuse at McKiny, Collan co texas and believe me as ever, your brother,
to Belle Bellew
Lexington, Ky.

Sept the 30 18.70

Baxter springs cansus

Sister I start across the Indian Nation tomorrow I have good helth as comin I all so xpect to make something this trip have had good luck with my stock this year so far I dont expect to stay south longer than february so I hope you will be cheerfull and dont dispare of your brother making something this year I have had splendid wether since I started James Golden is with me and I think will stay with me till I come back I will write to you once in two weaks while I am gon and I want you to write me at McKiny Collon co texas so I can get it when I get thare I am so antious to make something so I can take care of you and myself and quit this transit Bisness take good care of your helth and beleave me your Devoted Brother
(To Belle Bellew, Lexington, Ky.)

(To Miss Clara Golden)

Sherman Tex Oct 15 18.70

Well Clara after thinking of what you wrote me and the impression you was laborin under you will find me full up to my promise to get reddy by the first of December to get maried. I will be at home by that time I think my Bisness will be so I can leave I can keep you from starving I think at least, I shall do the best I can perhaps we will go and see your sistey moly write her that you expect to be there on your weding toor; and to spend a few days with her. James will start up in some two weaks from now I will be there as soon as I can make arrangements with my goods. be of good cheer I will take care of you the rest of your days if something dont happen that I know nothing aboute we will make near a thousand dollars on the trip down, if you dont Back oute and we get married I think I will quit trading and stay at home after this trip will settle in Mo I think I will send money anuf to pay all I ow by your Brother and to fit up over there every thing to go to house keeping as soon as I come Home—you need not give yourself eny oneasy ness about me for I will be there in time much love to all the family and xcept the largest share for yourself and beleave me as ever yours

S. m. Bellew

(To Miss Clara Golden, written before the murder, and mailed after, at Quitman, Tex.)

Oct the 21 18.70

Kind Friend it has bin some time since I saw you but if I keep able to travel and nothing happens more

than I know of I will see you in the corse of six weeks that will be about the first of december Clarra dont fail to be ready to have the sorrymony said and dont disipoint me when I come James is well and seames to be injoying the trip vary well espeshaly the profits of the trip our trip is vary promicing for a nice proffite. we will be at Jefferson by the first of November if I keep well anuff to travel I have not bin traveling mutch since the 16 I have bin quite un well ever since then I am well anuff to walk round, and travel 8—or ten miles a day; I have had the As ma the worst kind and yesterday its turned to Chills but I think I will get along now. for I have bin my own doctor—I hope you have bin well. ever since I left I shoold like to see you vary mutch I think uncle john mite have wrote me a few lines it wold not have tuck him long. we had quite a frost hear nite be fore last. you will not have time to rite me eny more as the an swer wil not get to Jefferson before we leave thare I have not had but one and I think I shoold of had or wood like to of had 4—or 5 before now. after we sell I expect to stop a few dais to get contracks for mules James will come down with them I have give him money to furnish the house at Shelbina for your benefit and mine mutch love to all the family and friends and except the gratist part for your self, as ever yours
S m Bellew

(Letter to his sister, written in New Orleans, on his return from Texas.)

Dear sister

November the 6—18,70

I have succeeded in bisness this trip beyond my expectations I have sold my intire stock at a proffite. and I am in New orleans solisiting contracks for a nother trip—I am in good helth as useal. hope you will be cheerful, till I see you I may be in Ky in next month on bisness and if I do I will come and see you. and if you need eny meens I will let you have them then I dont concider it safe to send it from hear. I like the people of this country vary mutch hope to live hear some day mutch love to all the friends and relatives and beleave me as your devoted Brother
S m Bellew

(Letter to Robert Caldwell of Ky.)

Mendon Adams co ills. Dec. the 23, 18,70

Kind Friend I have at last fond time to write you a fiew lines I have bin vary sick with feaver. but I am getting well. now uncle John Goldens family is well.—that is all that is at home. now Robert I am going to tell you that James Golden has not got Home yet. and as he has a large amount of money with him I want you to write me if he said enything to you or ant Peggy, of going to eny other cuntry in the letters he wrote you and ant Peggy, I want you to give this your special attention as your uncle is bond for a large amount of the money. get the letters he wrote

you and her and read them over particular and if he has said any thing about a trip I want you to write me at this place or write to uncle John as soon as you get this note now Robert I want you to keep this all to your self, for he may have got sick but he has not written home for some 9 weeks and he shoold have bin home 3 weeks before I was he tuck a large amounts of money to pay off my dets of Boroed money, and I have not heard from him since he left onlly throw his sweat hart she got a letter from him aboute a month after he started Home I staid south after he left some two or three weeks to get contracks for mules. and when I come Home he was not thare. we think he has gone to Canady from the best I can trace him, write soon and be shure and say nothing to eny one about this matter for he may turn up all rite yet. but we have lost all hope of it mutch love to all. the family and friends and to all the Boys success in biseness long life and happiness is the wish of your friend
S, M, Bellew.

November 30.

The following letters were admitted and read:

Letter from Ballew to Newton Childers, of Kentucky, written in Adams County, Ill., Nov. 29, 1870, in which he states that he has at last got home—that he is very weak—that he is in a “vary sorrow condition”—that he is going to be treated by Dr. Young—that he has a “nervus desease,” etc., etc.

(Letter to his uncle, J. D. Ballew, of Collin County, Texas, after his return.)

Shelbina mo Nov. 29. 18.70

Dear uncle I have at last found time to rite you a fiew lines. well to commence with I did well with my Horses had to go to New orleans to take a boat tuck the yellow feaver liked to of died just got to cusin E, a, dougherties just abel to set up. found the family all well but cusin Beck mullins she died while I was gone. with Hemerge of the lunges—I teligraph to sister she has got quite well. uncle I had a vary hard trip taken ever thing in to consideration and come vary near handing in my account for final settlement. well give my vary best love to ant Serelda . . . and to cusin Cuts and tell him to make a man of himself. and aspire and labor for public favor and poplarity. and to cusin Cate she has my kindest regards and best wishes for her success in life happines marige and life ever lasting is the wishes of her cusin now uncle I have a request to make of you and that is to make a box and put them too guns the rifle and shot gun in it and send them to Jefferson by Lewis or some one else and have them expressed to E, a, dougherty at Shelbina mo. and we can pay the express on them hear. cusin Dougherty was quite angry at me for leaving it at your house and refuses to take enything but the gun so please send it as soone as you get this if luis is not coming to Jefferson take them to some of the Merchants at McKinney and send them on a waggon that is going to Jefferson for goods. please

be prompt in this and send them immediately write me at Shelbina in care of E. a dougherty yours with due respect

Stephen m Ballew

John W. Golden. We received many letters purporting to be from my son, written in his handwriting, with the exception of the dates, and they were all in Ballew's handwriting. After Ballew got back, he asked me if I had received a letter from my son James, written at Jefferson, and upon being informed that I had, Ballew remarked that he wanted a copy of that letter as it was all he had to vindicate himself; this was before there was any suspicion of Golden's being murdered.

Jefferson, Texas, Nov. the "1, 18,70"

Esteemed Father:

I embrace the present opportunity of addressing you a few lines to let you know that we are well at the present time. We have had very good health all the time since we left home. Hope this may find you all enjoying good health. We have had very good luck all the time; some of our horses were sick for a time or two but are well again. They looked very well when we got through. The mare held her own as well, if not better, than any of them. We left Baxter Springs, Kansas, on the 2nd of October, and crossed Red River on the 12th. There is some very fine land in the Indian Nation—as fine as ever lay out of doors, and plenty of it. I saw the tallest cornstalks in the north part of the Creek Nation that I ever saw, and the corn had not been more than half attended to. The people in Texas were pretty well through gathering corn when we got here. The cotton is good in this State, as a general thing, and people were busy picking when we got here. I guess they will pick all winter if it don't frost enough to kill the cotton. The weather is warm and nice. There is as good land here as I have seen anywhere. The east part of the State is sandy, but from 80 miles east of Sherman, from that west the land is hard to beat. There is plenty of limestone in all of it. Now, about our business. The land that Steve bought here while in Kentucky, he admitted me as a partner in it, and sold it at Sherman to a real estate company for a profit of \$2,580, of which I get one-half in specie, and our St. Louis stock went off at a profit of \$3,400, giving me a profit of \$2,990 in specie, clear of expenses on the trip. How is that compared with Illinois? I have got the money for your horses, and the \$2,500 that you wanted, for which I have receipted to Stephen. Steve has come right up on the square in everything that he agreed to, and I have money enough to pay off all of Steve's indebtedness and to furnish him a house in Shelbina, and if you lose another one of your girls soon after we get home, you need not be surprised. I expect to start home in a day or two. Steve is going to stop along the river to get contracts for mules. We expect to want all the mules we can buy up there, when we get back, if we can get contracts to suit

us, and I think we can. I believe I have written all the particulars, so no more at present, but remain as ever, your son,
James P. Golden.

To John W. and Elizabeth Golden.

Mr. Golden. Ballew told me when he came back that my son wrote the letters purporting to have been written at Jefferson; he said my son wrote them and the receipt in the tent warehouse at Jefferson; he never explained

to me how the dates in the letters and receipt came to be in his own handwriting, nor how they came to be mailed at Shreveport; he would never talk to me much about them.

Mendon, Ills. Dec the 9, 1870

Dear Sister I received your letter yesterday evening was sorry to hear of your trouble. I am still quite sick. as regards the money I sent you \$150 in the last weak in Oct last while I was at Jefferson texas. strange you Did not get it, Sister I will send by express \$40 more and I want you to come and see me and take care of me tile I get well or Die Sister \$40 is all the money I have got by me it will pay your expences oute here, and then if you need to send eny back you Can as soon as it is Collected Sister I am in a little house and no one to take care of me plesse come till I get well eny way and come rite off if you wish to see your brother alive. sister bring all you have with you for if I get well I will rent a nice little house in town hear and I want you to stay with me and not teach any more don't spend the money I send you ondy to Come and to see your sick Brother and come so you can stay Bring all your Stocks of everything and come Soon as my Desease is likely to make a change at eny time rite by return mail and tell me when you will be here and I will send some one to meat you sister dont disipoint me for I want to see you before I die. write soon pleas come
S m Ballew

Mr. Golden. At the time the above letter was written Ballew was at my house and receiving

all the attention from my family that a son could wish.

(The following letter was held not admissible, except the part given below. It was written by Ballew to his sister Belle. After stating to his sister about the trip south, from which he had just returned, he states: "I expect to make another trip south this fall and try my luck over I want you to be of good cheer I shall continue to work for a time I think I have things so bunched that I have no doute of success this trip, I was able to pay off all the money I owed and they all think here that I made money." The rest of the letter was excluded.

The State introduced a letter from Ballew to James P. Golden, written at Camden, Ark., Feb. 30, 1870. The letter was very lengthy, and was evidently written for the purpose of inducing young

Golden to get ready to accompany him south on the next trip; states that he has just returned from burying poor Dougherty with Masonic honors; how Dougherty clung to life; about his being appointed by Dougherty's will, "administrator," and D.'s leaving him, by will, \$9,500; and closes by stating to Golden that he must get ready to come south with him next fall.

John W. Golden. After Ballew came back he seemed very different from what he was when he went away; whenever my absent son's name was mentioned he would always let on he had taken a chill; seemed very nervous and excited whenever my son was mentioned; always wanted a light in his room at night; said he could not rest without a light in his room; would get up in the night and walk the floor and smoke. Before Ballew left with my son, he could rest as well as any of the family. One day while at dinner prisoner seemed to be in a trading mood, and was livelier than he had been at any time since he returned from the trip, when some of my family mentioned my son's name and he at once quit eating and said he had a chill; told me that the milk must have given him the chill; he never mentioned my son's name unless some of the family spoke about him; always had his pistol under the head of his bed; he said he had got so used to having his pistol that he could not do without it; kept the pistol under the head of his bed after he married my daughter. Did not keep it there before starting south with my son. Ballew said at one time when my son was mentioned that my son was so well pleased with the trade and Texas that he would never farm any more in Illinois. After Ballew married my daughter he wanted me to give him a farm; said he thought it would

be no more than right that I should give him a farm as my son had run off with all his money. Told me that if I would deed him the farm spoken of, he could raise \$2,000 on it and soon make up his loss by trading down south. The farm he wanted was worth about \$4,000. (Two pictures shown witness.) Know the pictures; one is my son James and the other is Ballew's; they had them taken the day before they left my house to go south; they wore their beard as in the pictures at the time of starting; when prisoner returned he had whiskers all over his face. Was present when Ballew was arrested on the charge of murdering my son; was in Quincy, Ill.; he turned very white and trembled so that he could hardly speak; it was a very cold day, but great drops of sweat ran from off his face.

Cross-examined. My son was a single man; had never been married; he was going on 28 years of age; had always lived with me and worked on the farm; my son executed his note to Ballew for \$2,000, which was secured by a deed of trust on his land in Adams County, Ill. Went my son's security on a \$5,000 note, given by him to Ballew; Ballew reported that he had bought \$22,000 worth of goods in St. Louis; that he had paid \$14,000 down and got time on the other \$8,000 until he sold the goods; the \$2,000 and \$5,000 notes were to make my son an

equal partner in the goods; that was half of what Ballew said he had paid for them; the \$1,500 note was given by Ballew to me for the payment of the horses he had taken south on his first trip; sent that note, at the request of Ballew, with my son for Ballew to pay off; Ballew brought the \$1,500 note back with him and said he had paid the money to my son in Texas; he had his name torn off the note; Ballew had what purported to be a receipt from my son for the \$2,500 which he had promised to loan me before starting south; said he had paid the money the receipt called for over to my son in Texas; he then wanted me to give him my note to secure the \$2,500, which I did; at that time I did not notice the date in the receipt to be in Ballew's handwriting; did not believe anything wrong in the matter; know the fine boots in court, they belonged to my son; my son had worn them to Kentucky and back when on a visit there with my daughter and Ballew a short time before starting south; that was all he had worn them; my son told me he loaned the boots while in Kentucky to Ballew to wear one time and that Ballew stretched them until they were a little loose for him; know the boots from the manner in which they are made. Ballew married my daughter in December, 1870; never let Ballew know that I was opposed to his marrying my daughter; frequently talked about the matter to my wife; we thought it best to let our daughter do as she pleased. The last time I saw my son alive was in Quincy, Ill. My son was a good hand on the farm; he was

a good, "old-fashioned" boy; not "big-headed;" not very talkative; could always rely upon what he said; I do not think any person could influence him to tell a lie, knowingly; he was very confiding and believed whatever his friends told him; he had the most entire confidence in Ballew and would do anything he was requested to do by him.

December 2.

Mrs. Elizabeth Golden. Am the mother of James P. Golden. I have known prisoner since the year before the war closed; my son and he started to Texas together on 13th September, 1870; he came to our house in the fall of 1869—November—and remained there until in the month of February, 1870, when he started south; he took four head of horses with him; they belonged to my husband; he returned from the trip south some time in May, 1870; heard him talking with my son about his (my son) going south with him that fall; they were to go south to trade in stock; do not know much about the agreement between them. He returned from the trip on which my son went with him on 18th November, 1870; saw something was the matter with him; he told me he had been sick; he looked very badly; one of my little daughters asked him where Jimmy was; he said he expected to find him at home; he seemed much affected, I shook my head at my little girl not to disturb him; his conduct was altogether different from what it was before he went away; he wanted a light in his room at night and had his pistol at the head of his bed; asked him why he kept his pistol there, and he said he had

traveled so much that he did not feel right without it. He would always take a chill whenever we commenced talking about Jimmy, my son. I made all the underclothing of my son; he took away a black suit, a suit of yellow mixed, and a light suit; the yellow-mixed suit he bought in Quincy some ten or twelve months before he started south; my son had a coat which prisoner gave him; it was a jeans coat—sack; put a new piece of lining in the back of it, over the old lining, and put new binding on over the old binding; would know the coat if I saw it; have with me some of the same kind of lining. That is the coat; here is the lining I put on for my son, and you see the binding. My son took with him a pair of blue drilling pants, three muslin shirts, which I made myself. These are the shirts I made for my son, and which he took on the trip south; have not seen them until now since my son left. These were shirts that had not been obtained by Mr. Ewing when in Texas. (One of the shirts thus described by witness was found on the remains and had been taken to Illinois.) The drawers and other clothing found with the remains I identify as that of my son; the socks I identify. (All the other clothing that her son had taken along was accurately described by witness—piece by piece—and then shown to her, which she recognized at once, and testified positively as that of her deceased son, which together with clothing belonging to her husband which she had brought along on purpose, made at the same time and in the same manner, were shown

to the jury, and found to correspond precisely. The skull of deceased was here shown to witness and she recognized it as that of her son, having previously given a description of the teeth, by which she identified it. Mrs. Golden stated that she was feeling very weak and the cross-examination was postponed until another time.)

Dr. Thomas W. Wiley. Am a practicing physician and surgeon; have made anatomy and the construction of the human frame a study; examined the remains that were said to be those of James P. Golden, on 13th of February, 1871; the bones were lying where they were said to have been found, some three or four miles south of McKinney, in Collin County, Texas. They were scattered over some ten or fifteen feet of ground; I found a majority of the bones; all the larger ones. At the time I made the examination there was a little flesh on one foot. The remains are those of a male person who was, in life, something near five feet eight or ten inches in height; placed the bones together and formed that opinion of the height of the man when living. (Skull shown witness.) Am certain this is the skull that I examined last February; was summoned to make the examination at that time by the coroner who held the inquest; my examination was for the purpose of determining the manner in which the person came to his death; give it as my opinion that the person was shot, the ball entering the right temple and coming out a little lower down on the opposite side of the head. There must have been as many

as three or four heavy blows made on the skull to make the fractures that are in it; they could not have been inflicted by the person himself; the blows must have been with some heavy instrument; either with the butt of a gun or some other heavy substance; such fractures would produce almost instant death; I give it as my opinion that the fractures in this skull caused the death of the person; from the appearance of the remains the person must have been dead some three or four months; the vultures or beasts had eaten nearly all the flesh from his bones; the bones of one of the legs were still together at the knee-joint when I examined them; the place where I examined the remains was a very secluded one; was in such a vast brush thicket that we had to cut a path through before getting to them without great difficulty.

Cross-examined. Do not think any of the scalp was on the skull; the breaks in the skull could not have been made after the scalp was off without showing marks made by the instrument; the skull did not show such marks; there was blood on the hair that was found with the remains; think there was blood on the clothing; though there had been several rains and the clothing was very dirty and faded.

George W. Simpson. Live 16 miles north of McKinney, on the road leading from McKinney to Sherman; have seen prisoner before, in the fall of 1870, a few days previous to the fair at McKinney, at my gate. My house is what is called "Buckhorn Tavern;" there was a young man

with him; they were traveling in a new wagon with a cover on; they had two horses hitched in the wagon and a gray stallion tied behind the wagon; he had whiskers all over his face; they looked to be three or four weeks old. He told me his name was Ballew and asked for and got a drink of water. Asked me where they could find a good place to camp; told him on the east fork of Trinity River, which was two and one-half or three miles ahead. They were coming from Sherman and going in the direction of McKinney; they started on and soon after they left it commenced raining. Just before they started from my house, while prisoner was talking with me, the young man that was with the prisoner said: "Ballew, let us go." While talking with prisoner asked him whether he knew John Ballew of Kentucky, who was an old friend of mine. He said he had an uncle named Jonathan Ballew, who lived about six miles south of McKinney. The young man that was with defendant was a little taller, and not quite so heavy as defendant. (Here two photographs were handed to witness—one prisoner, the other Golden.) This is the picture of the young man that was with him (holding up the picture of James P. Golden.) Golden would have weighed some 145 or 150 pounds; think he had beard over his face; they looked to be three or four weeks old; were very thin on the face. Next time I saw the defendant was when Sheriff Bush was bringing him from Illinois, in the month of June last; then recognized him and told him about stopping at

my house the fall before, when he said I must be mistaken in the man. Was within six or eight feet of Golden and could see him very well.

Cross-examined. Was threshing wheat when defendant was at my house; I was after water when I saw him and Golden; might be mistaken as to the prisoner being the man; he wore his whiskers differently then than now.

Henry Haning. Live in the north part of the county, about three miles south of "Buckhorn Tavern," and near the Trinity River. Cannot say positively that I have seen prisoner before I saw him in court; he appears to look natural to me; am certain I saw him on the east fork of Trinity in the fall of 1870; think it was in October; there was a young man with him; they had a new wagon with a sheet over the bows; had three horses; they were working two to the wagon and had the gray tied to the wagon. Had a conversation with one of the young men who called himself Golden. The defendant is better dressed now than he was then, and is whiter. (Golden's picture shown witness.) This is a picture of the young man I talked with, and who called himself Golden; he would weigh about 150 pounds; it was in the evening I saw them; I was at work within fifty steps of where they stopped. Golden asked me if I would take a slut and take care of her for him; told me he would give me \$10 to do so; told him I would take her and not charge him anything. In the evening after I quit work I went to the wagon and got it. He told me his full

name, James P. Golden, and requested that I should take it down, which I did. Said he lived in Adams County, Ill. Told me the man that was with him was named Ballew. Gave him my address on a slip of paper and he wrote it down in a day book. He told me the slut's name was "Prince," and that she was fine stock. He said they wanted to go to the fair at McKinney; they had two other dogs along. The next morning when I went to work they were gone; the wagon tracks were in the direction of McKinney. John W. Golden described the slut to me before he saw her at my house; he told me her name, which was the same as that given by young Golden. Mr. and Mrs. Golden were at my house about a week ago; they were on their way from Illinois to McKinney. The slut that young Golden left with me recognized them as soon as she saw them, and ran and jumped up against Mrs. Golden.

Harrison Massey. Live two miles south of "Buckhorn Tavern," kept by Mr. Simpson. Saw prisoner camped on east fork of Trinity, in the fall of 1870, some 14 miles north of this place. Henry Haning and Joe Phillips were with me. There was a young man with prisoner; they had a new wagon and cover on; three horses, one of them was a gray stallion; have had a horse pointed out to me now in the possession of Mr. Childers; looks like the same gray horse. The young man that was with prisoner went to Mr. Haning's to take a slut; while he was gone Mr. Phillips and I remained at the wagon with prisoner; Mr. Phillips was talking with him; I

sat and listened at them talk; prisoner said he was on a trading expedition to this country; said he wanted to get to McKinney the next day to attend the fair. That is the picture of prisoner; he had whickers all over his face when I saw him. (Another picture shown.) That is the picture of the young man that was with the defendant, and took the slut up to Mr. Haning's.

Cross-examined. I saw the pictures shown me here, last Monday; Col. Ewing and District-Attorney Smith handed me these pictures while in the room conversing with the witnesses, and asked me if I recognized either of them; told him I did, one as that of prisoner, and the other as that of the young man I saw with him in the fall of 1870.

Joseph Phillips. Live near Henry Haning's, two and one-half or three miles south of "Buckhorn Tavern;" was living there in fall, 1870. Have seen prisoner before; just before the fair at McKinney, in the fall of 1870; he was camped on the east fork of Trinity. There was a young man with him who went up to Mr. Haning's house to take a slut. Talked with prisoner while the young man that was with him was gone; he told me he was going to the fair at McKinney; had a new thimble-skein wagon and three horses, one of them a gray stallion. Prisoner had more beard on his face then than now; the young man with him was of light complexion; had a little beard over his face; prisoner told me his name was Ballew. Was present next morning when they started off; Ballew said, as they started, "Take the gun, Jim; you might

see something to shoot." The gun was a small, single-barreled shot gun, brass guards and brass at the butt. (Gun shown witness.) That is the gun. They had two other dogs with them besides the one left at Haning's; they had the gray stallion tied to the wagon, leading, when starting off.

Joseph J. Chastian. Live in McKinney; am postmaster; have seen prisoner at two different times; once during October, 1870; he came there to mail some letters; he also inquired for letters; he told me he was on a trading expedition to Texas; said he was camped on the creek; said he left his partner in camp and must hurry back. The other time was the winter before; he then said he was on a visit to see his uncle, Jonathan Ballew. (Several letters shown witness.) They are the postmarks of the McKinney Postoffice—Oct. 20, 1870; think that was about the time defendant was at the office.

John E. Howell. Live in McKinney; was merchandising here in the fall of 1870; saw prisoner in October, 1870; he came into my store and I thought he was a drummer. He said he had been in the goods business himself. It was about time that the fair was to be held that I saw him; do not remember how he was wearing his beard.

Cross-examined. May be mistaken about prisoner's being the man; take him to be the same one; he did not remain in the store long; there was no person with him.

December 4, 1871.

James Ware. Was living near McKinney in the fall of 1870,

and still reside there. Knew where the remains of James P. Golden were found; some time in the fall of 1870, a short time before the fair at McKinney, saw parties camped near where the remains were found; there were two persons; did not notice them close enough to identify either now; they had a new thimble-skein wagon, with cover on the bows; had three horses—one a gray stallion; cannot describe the other horse; have seen the gray stallion in the possession of John Childers; saw a black dog; did not speak to the men; saw they were young looking men; have seen the wagon since in the possession of Mr. A. J. Lewis. The place where they camped was some three-quarters or a mile off the public road; the place where the remains were found is an immense thicket, entirely secluded from public view.

Cross-examined. May be mistaken about the wagon being the same that I saw in Mr. Lewis' possession; think it is the same; the gray stallion in the possession of Mr. Childers is not as clear now as when I saw him at their camp.

Henry Southwood. Live south of McKinney, one-half mile of Jonathan D. Ballew's; have seen prisoner before; some time in the latter part of the winter of 1870 while he was visiting his uncle, Jonathan Ballew; some in the fall of 1870 saw prisoner driving a two-horse wagon, and going over "hog wallows" in a trot, in the direction of Jonathan Ballew's. The wagon was new, thimble skeined; the wagon cover was up on the hind bows; he was driving two horses in the wagon and leading a gray stallion be-

hind the wagon; there were two dogs following along—one black and the other brindle or brown. Have seen the gray stallion in the possession of Mr. Childers since his trial commenced; it looks like the same horse, and not in as good order; have seen the wagon since in the possession of Mr. Lewis.

William Smittey. Live six miles south of McKinney; prisoner passed my house on 21st of October, 1870; he had a new thimble-skein wagon; had two horses in the wagon and was leading a gray horse behind; he was in his shirt sleeves; had beard all over his face; have seen the horse in possession of Mr. Childers; think it is the same one I saw him leading behind the wagon; he was coming from the place where the remains of James P. Golden was found; was going toward Jonathan Ballew's; saw the same wagon at Mr. Lewis' house, and in his possession; prisoner had a gun tied to the wagon bows.

William Mattox. In fall of 1870, I lost a child; she was buried on 21st day October. Saw prisoner on that day passing my horse; he was driving a thimble-skein wagon, new, with the cover hanging on the hind bows. Had three horses, two in the team driving, and a gray stallion leading; think the horse in the possession of Mr. Childers is the one I saw leading behind the wagon; knew prisoner before that. Live between Mr. Smittey and J. D. Ballew. Have seen the wagon in possession of Mr. Lewis.

Cross-examined. Was within fifty yards of prisoner the day he passed my house. He had whiskers all over his face; am

not mistaken; he was driving in a fast walk.

William S. Coffey. Live on the road between where the remains were found and Jonathan Ballew; saw a man pass, the day Mr. Mattox's child was buried, in a new wagon, with cover on the hind bows; there was a gun tied up to the bows; a gray horse tied behind the wagon; have seen the gray horse in Mr. Childers' possession; it looks like the same one.

Cross-examined. Think it was a thimble-skein wagon. Cannot say prisoner is the man I saw driving it; he looks like the same.

Milton W. Coffey. Lived three-fourths of a mile from Jonathan D. Ballew's in the fall of 1870. Think I have seen prisoner before; saw him on the Rockwall road, going in the direction of where J. D. Ballew lived; he had a new wagon and three horses; one a gray, which he was leading. There was a gun tied to the wagon bows. It was on the day Mr. Mattox's child was buried—in October some time. He wanted to know of me if I knew of anybody who wanted to buy a wagon; he was going to Jonathan Ballew's, who was a relative of his. He told me his name was Ballew; had whiskers all over his face. There was a gun tied to the wagon bows.

Randolph Ballew. Am 19 years old; live with my father, Jonathan Ballew. Stephen Ballew is my cousin. He came to my father's house in the spring of 1870; he said on his first trip that he came from Missouri. He brought a bay mare, a red roan horse and a chestnut sorrel horse.

There was a negro man with him on that trip. He left the bay mare and the roan horse at my father's house and rode the other off; we were to keep them until he returned in the fall. Mr. Lewis got the bay mare from defendant when he returned in the fall, in October, 1870. On Friday, 21st day October, prisoner returned to my father's house; he had a two-horse wagon with a spring seat in it; it was a new thimble-skein wagon; there was a gun tied to the bows; there were two horses hitched in the wagon and a gray stallion tied behind; have seen the gray stallion since in the possession of John W. Childers. (Gun shown witness.) That is the gun that he had tied to the wagon bows. He said he had come from Illinois. He had cooking utensils with him; had an ax, hatchet and shovel. It was a rifle gun that was tied to the bows; he also had a single-barreled shot gun in the wagon. (Gun identified in court.) He told me he got the shot gun from Ezra Dougherty. That is a bridle he left on his second trip. Defendant had with him a trunk, which he sold to A. J. Lewis, and an overcoat and a black dress suit. (The trunk and clothing were here handed to witness and identified.) The black dress suit shown me is the one prisoner gave me in the fall; he said he had bought them expressly for me, as he had promised them; said he had come to stay all winter, but that he had received a letter at Sherman from his sister, and that she was sick and that he must hurry up to Kentucky to see her. Said he wanted to sell the wagon, or trade it for

horses, as he could travel faster on horseback. He took the trunk out of the wagon the same evening he came to our house; the trunk in court is the same one; said it was his; claimed everything he had along as his property. He would not eat but very little; said he was sick. He was very restless during the night; his actions were all different from what they were when he was at our house before. Kept his pistol on; said he did not feel right without it. He was up next morning before any of the family. Said nothing about goods; said he had come down as far as Sherman with a wagon train, and from there he came alone. He said James Golden intended to come down with him, but something happened and he did not. Mr. Lewis came to my father's house in the evening of the day prisoner got there and commenced talking to him about trading for the wagon; he gave prisoner a gray mule and a brown horse for the wagon. John Bowman started with defendant to Shreveport. Prisoner took with him the horses he left at my father's house on his first trip; he also took off the gray stallion. He seemed to be in a great hurry; he did not eat any breakfast; took a cup of coffee and went out in the yard to drink it; would not sit down to the table with the family. I saw him take out of the trunk a brown plush hat; it was a new hat. (Hat shown witness.) That looks like the hat; it is more worn now. He had beard all over his face. He sold trunk to A. J. Lewis for \$5. Saw him have the things shown me in court when he came to my father's house on 21st October, 1870.

Cross-examined. It was on his last trip that he said James Golden intended to come, but something happened and he did not. Am certain the gray horse was tied behind the wagon when prisoner came to our house; the gray horse in the possession of Mr. Childers is the same one prisoner brought with him. Recognize the trunk and clothing shown me in court as the same defendant had with him when he came to father's house, on 21st October, 1870.

Jonathan D. Ballew. Live about eight or nine miles southeast of McKinney; am father of Randolph Ballew and uncle of prisoner. The most direct route to my house from McKinney is by the Rockwall road; the place where the remains were found is a mile or more out of the way in going from McKinney to my house. The road by where the remains were found is a neighborhood road, and not as good as the public road. Last March a year ago—1870—prisoner came to my house and introduced himself as Stephen Ballew, my brother's son; had not seen him before since he was a little boy; he remained with me about one month. There was a colored man with him when he came the first time to my house, who went away with him. He left with me on that trip a bay mare, roan horse and a chestnut sorrel horse; said they were his, and left them with me to keep until he returned in the fall. He returned to my house again on the 21st of October, 1870, in the afternoon; he came alone; had with him three horses, a new thimble-skein wagon with spring seat and with bows; a red roan mare, dark roan

gelding and a gray stallion; the stallion was tied behind the wagon. He had a gun tied to the wagon bows. (Gun shown witness.) That is the gun; he had another gun—two in all—one a rifle and the other a single-barreled shot gun; he told me to sell the guns and send him the money. He came in the afternoon and left quite early next morning; he said he had come down to stay, but had received a letter from his sister and she was very sick, and that he wanted to hurry back to see her. He told Lewis that he was giving him a good trade on the wagon, as he was anxious to get to his sister, and could travel faster on horseback. He sold the bay mare to A. J. Lewis, and took all the rest on with him the next morning, October 22, 1870. He told me he was very unwell, and that was the reason he could not eat. His actions were different from what they were when he was down before; my family noticed it and talked about it after he left. John Bowman started from my house with him; they started to go to Shreveport; he said nothing about going to Jefferson, Texas; said nothing about goods; said other wagons came with him as far as Sherman, and from there he came down alone; said nothing in my hearing about James Golden; did not hear him call his name; said nothing about having any goods or having sold any; said he would sell the horses at Shreveport, and then go home by water. He claimed the horses and all the property he brought as his own; he would say, my horses, my wagon, my trunk, etc., when alluding to them. Do not remember how prisoner was

dressed and how he wore his whiskers. (Clothing shown witness.) That is the clothing defendant brought to my house in October, 1870.

December 5.

Mrs. Surilda Ballew. Am wife of Jonathan D. Ballew; have known prisoner two years next March; had not seen him since he was a little boy, until he came to our house in this county, in March, 1870. He told my son Randolph that he would bring him a fine suit of clothes in the fall, if he would take care of the horses. On Friday, 21st October, 1870, prisoner came to our house again; it was in the afternoon; he looked pale and sickly; seemed to be very much different in his actions from what he was when he was with us in the spring; he did not eat any dinner the day he arrived; said he had come from Missouri; expected to stay and team, but had received a letter from his sister, and that she was sick and he wanted to hurry home to see her. Defendant traded the wagon he had to Andy Lewis. (Here the gun, trunk, clothing, cooking utensils, etc., were shown witness and identified as those brought to her house by defendant in October, 1870.) He did not eat any supper, and only drank a cup of coffee for breakfast; he drank that out in the yard, and would not sit down at the table with the family; gave as an excuse for his not eating and haste to get away the sickness of his sister. His whole manner was different from what it was when he was with us before; my family noticed it and talked about it after he had left. Recognize all the articles of

clothing, etc., shown me here in court as the ones he brought to our house in October, 1870. Prisoner was very anxious to trade off the wagon; said he could travel faster on horseback. Did not say anything about having goods; said nothing about going to Jefferson; said nothing in my presence about James Golden; he never mentioned his name in my hearing; told me he came down to team.

Andrew J. Lewis. Live near Jonathan D. Ballew's. I first saw prisoner in latter part of February or first of March, 1870; he was then visiting his uncle, J. D. Ballew. Next time I saw him was in October, 1870; he was at Jonathan D. Ballew's house; he then had a new thimble-skein wagon, and three head of horses with him on this trip. Have seen the gray stallion in the possession of John Childers. Prisoner asked me to trade for the wagon; said he was going to Shreveport, and stock would sell better than the wagon; he traded me the wagon, harness and a mare for a mule and horse; also purchased a trunk from defendant; he also gave me a frying pan, coffee pot and water keg; the trunk and utensils here in court are the same I got from him in October, 1870; gave him \$5 for the trunk. He came to my house about daylight on the morning of October 22, and stated that if we traded it must be done soon, as he was in a great hurry to leave. Saw defendant and John Bowman start for Shreveport; defendant said nothing about goods; did not speak of going to Jefferson; did not mention James Golden's name; said he was going to

Shreveport and on to Kentucky to see his sick sister; he did not act like he did when I saw him in the spring; he was uneasy and troubled about something.

John C. Bowman. Live near Jonathan D. Ballew, in Collin County; saw prisoner at his uncle's in March, 1870; he said he had come from Missouri; on his first trip he told me that he was coming down in the fall and wanted me to meet him at Jonathan D. Ballew's and go with him to Shreveport to assist in taking stock; received the letter from defendant shown me here; the letter was postmarked at Shelbina, Mo., September 1, 1870. Met him in compliance with said letter at his uncle's in this county, October 15; was there at that time and waited for him; he arrived on the 21st; came alone; had a new wagon and three horses; one was a blue roan horse, the other a red roan mare, and the one that was leading behind the wagon a gray stallion; have seen one of the horses in the possession of Mr. Lewis; have seen the gray stallion in the possession of Mr. Childers since this trial commenced. He had a gun tied to the wagon bows when he came; had a trunk and clothing, also an ax, shovel and hatchet. He gave me some clothing; said he had more clothing than he wanted to carry with him; he sold me a bridle and halter; also gave me two knives, one a dirk and the other an eight-bladed knife; said he killed a Yankee Colonel during the war and got the dirk. (Here each article was shown witness and identified as the same he got from prisoner on

the last trip and which the prosecution proved was the property of young Golden.) See letter to John Bowman, *ante*, p. 338. He and I left Jonathan D. Ballew's to go to Shreveport, La., Oct. 22, 1870; slept with defendant the night before we started; he was very restless and got up several times during the night; complained of being sick; was in a great hurry to get started in the morning; said his sister was about to die and he wanted to see her; the sickness of his sister was the only reason he assigned why he was in such a great hurry. (Here a letter was read in evidence, written by Ballew, at New Orleans, in November, to his sister, in which he tells her that he is well, as usual, and was glad to hear in her last letter, received while in Texas that she was well, etc., and that he might be in Kentucky late in the fall, on business and would call and see her. (See *ante*.) We traveled some forty or fifty miles the first day; went some twenty-five or twenty-seven miles after night; we traveled in the night until we came to the Sabine River and it was up so it could not be forded; defendant wanted to swim the river and go on, but I refused to do so and we camped. He told me to keep my pistols close and dry so that they would be ready for use in case I needed them; said he would let me watch the horses a while and he would try and sleep; he turned over frequently and was restless. He told me to keep my dragoon dry; he called a pistol a dragoon. The next day we got to John W. Childers' near Quitman, Wood County, Texas; he wanted to

start on the next morning from Childers', but Mr. Childers got him to wait a day or so for his (Childers') cousin, who was going to Kentucky. There was no person with defendant and myself while going from Collin County to Quitman. Did not hear defendant mention Golden's name; did not hear him say anything about goods; did not hear him speak of going to Jefferson. (Picture of James P. Golden handed witness.) There was no such a man with defendant at Quitman or on the road to that place. (Here a letter was offered in evidence and read, written by Ballew to Miss Clara Golden, and mailed at Quitman, Texas, October 25, 1870, in which he states that James Golden is along and seems to be enjoying the trip finely, especially the profits of the trip. See *ante*.) Saw defendant trade the gray stallion to Mr. Childers; it is the same stallion that Mr. Childers has here, and the same one that was pointed out to the witness on last Monday; it is the same one that prisoner brought to his uncle's on the 21st day of October, 1870. Before we started from Collin County, defendant told me that if I had any specie he would take it and replace it when we got to Shreveport; he said greenbacks were at a discount of 22 per cent in Texas and only 18 per cent at Shreveport, and that he could make money by buying specie; did not hear him say he had any kind of money; I told him I had no specie and but very little money of any kind, as I was poor and made my living by day's work.

John W. Childers. Live in

Wood County, Texas, some three miles from Quitman; about eighty or ninety miles from where Jonathan Ballew lives. Am acquainted with prisoner; we were boys together in Kentucky; he is a cousin of mine. He came to my house in October, 1870; John Bowman came with him, a little after dark; they brought four horses and a mule; prisoner said he came from Missouri to sell horses. There was something the matter with him; at least, his actions made me think so; his conduct was so strange that my wife called my attention to it and we all talked about it after he left. He went to Quitman with me on Monday; he sold a roan horse and a red roan mare at Quitman; he traded me the gray stallion that I have here with me; it is the same one that the witnesses in this case looked at on Monday last; he stayed at my house two nights. Sunday and Monday nights; on Tuesday, 25th October, he went with me to Quitman and started from there to Shreveport; when we went to start to Quitman Tuesday morning, I stated that I would ride the gray stallion that I had bought of defendant the day before, when he remarked that I had better not ride him to town, as he was tired and would soon get in good order if I did not use him. Did not ride the stallion after the request of defendant not to do so. He was in Quitman that day; did not see him write any letters; he could have done so and I not have seen him, as I was on the Grand Jury and was away from him at times; there was no man with the defendant named James P. Golden; no one with him that

looked like the picture of James P. Golden; John Bowman was the only man with him at my house; he did not return to my house after the time he came there with Bowman; did not hear him mention the name of James P. Golden; did not hear him say anything about goods; did not hear him say that he was going to Jefferson; he said he was going to Shreveport and on to Kentucky, to see his sister, whom he said was sick, as a reason why he was in such a hurry; he did not eat very much because he had the chills. He brought to my house a hat, a new plush hat; am now wearing it; he took my hat, which was the same kind and color and left his with me; he did this without my consent; the hat he took of mine had a broader brim than the one he left; that was the only difference. (Both hats shown witness and identified. The hat which defendant had left with Mr. Childers having been previously identified as the one young Golden took away from home.) It was 100 miles to go by Jefferson from my house to Shreveport. Newton Childers was at my house when defendant and Bowman came there; he is a cousin of mine and lives in Kentucky; he was on a visit to my house at the time and was about ready to start back to Kentucky; defendant told him he would furnish him a horse to ride to Shreveport if he would go with him, which he did. Prisoner had been at my house the winter or spring before that time; his conduct the last time was altogether different from what it was his first trip; if he had asthma or chills while at Quitman I did not

know it; think I would have known it if such had been the case; he had whiskers all over his face; they looked to be five or six weeks old.

Joseph T. Scott. Live five miles south of McKinney; found the remains that are said to be those of James P. Golden on 11th February, 1871, one-half mile from my house, in Collin County, Texas; they were in a dense thicket on a branch; found them lying beside a very large log in one of the most dense thickets I ever saw; you could not see twenty feet from where the remains were found; never knew that the log was there before. Had a sow that had pigs hid out in the bottom; she came up on Sunday morning to get fed, and I followed her on her return to the bottom to find the pigs; she passed by the log where the remains were lying. I looked over to see if I could not find the pigs, when to my great astonishment and horror I saw a human skeleton, partly covered with clothing, lying by the side of the log; found under a large limb that put out from the log a hole where the remains had been buried, but not deep enough to keep the beast from pulling them out; saw one boot with a foot in it that looked natural; it had a blue sock on it with white heel and toe. (The same sock, together with every stitch of clothing found on the remains, had been previously identified as belonging to James P. Golden.) The rats had built a nest under the log out of the hair and had carried away many of the small bones of the skeleton to the nest; the other bones were scattered around over a space of some ten

or fifteen feet. A person is entirely hid from view when in the thicket; do not know whether anybody living around in the neighborhood knew of the log being there. The skull shown me in court is the same one I found; also recognize the boots and clothing found on the skeleton. The flesh was about all off the bones when I found them.

W. N. Bush. Am Sheriff of Collin County; was present at the Coroner's inquest held over the remains of James P. Golden, on 13th February, 1871, where the remains were found, some five miles south of this place; brought the remains and clothing to McKinney; had the remains interred; had the clothing washed and kept them until March, 1871, when I turned them over to W. G. Ewing; can identify the clothing here in court as the same; I cut out a piece from each garment and kept it; there was something on the clothing that looked like blood; also found some hair with the remains; it seemed to be matted together with blood. I examined the hole where the body had been buried; it was about twelve or eighteen inches deep; one of the hip bones was in the hole; the hole was dug with some kind of an implement; it could be dug with the shovel shown me in court as well as any other kind of an implement; the skull shown me here in court is the same one.

Mrs. Elizabeth Golden. (Recalled and cross-examined.) Am 51 years old; my memory is not good; has been impaired by the trouble about my son; do not remember that I was opposed to my son's going to Texas with prisoner; did not want any of

my children to go off so far; he was very anxious to have my son go, and I frequently heard him telling my son that they could make much more trading than farming. Prisoner is not related to our family except by marriage; he called me Aunt, and my husband Uncle John, but that grew out of the fact that he had been partly raised by Mr. Golden's sister. My son chewed tobacco, and was a very obedient and confiding young man.

To Mr. Smith. Prisoner did not seem able to eat when my son's name was mentioned. One day he left the table just as one of the children spoke James' name; he said he had a chill. Another day we were all sitting at dinner when one of the children called out, "Here's Jimmy." I ran to the door and saw a young man coming up the path. I thought it was my son and called to the children, "It's Jimmy." I was sure it was and shouted to him several times, but when he came nearer I saw it was another person, young Mr. Poage. Then I almost collapsed and broke with tears. But Ballew was not at the table and going into the bedroom I found him on the bed all in a sweat rolling about; he said he had just had a chill. When he got back and James' disappearance was spoken of in the family he said if it was made known by us he would go

off with his wife and we would not hear of them again.

J. M. Wilcox. Am Justice of the Peace in this county; was the officer that held the Coroner's inquest over the remains of James P. Golden; there was blood on the clothing and in the hair; the hole where the remains had been buried seemed to have been dug with some instrument.

John W. Golden (recalled). The wagon I saw in the possession of Mr. Lewis is the same one my son started with; the horses I found in Mr. Lewis' possession were some of those defendant told me he had sold at Shreveport on his first trip; they were my property and I have never received a cent for them; I recognize the clothing, knives, etc., shown me in court as the property my son took away with him and which he owned.

K. R. Craig. Am deputy clerk of the District Court of Collin County; am in the habit of using and handling paper. Letters Nos. 7½, 6, 14, 9, 7, 15 and 25 are of the same size and texture of paper. Letters Nos. 12, 11, 10, 16 and 13 are of the same manufacture, size, texture and quality. Nos. 11 and 13 are parts of the same sheet; Nos. 15 and 25 are parts of the same sheet; Nos. 6 and 14 are parts of the same sheet of paper; Nos. 9 and 7 same sheet.⁴

⁴ This testimony was for the purpose of showing to the jury that the letters written by Golden and Ballew, while going from Sherman, Texas, to McKinney, were on the same kind of paper, ink, etc., as the letters that were written by Golden and dated by Ballew, purporting to have been written by Golden at Jefferson, showing that defendant got Golden to write the letters in which the dates were left blank, at McKinney, or in that vicinity.

W. G. Ewing. I received this skull, boots, pieces of gloves, lock of hair, four buttons and all the clothing found on the body from Sheriff Bush. I got the trunk, here in court, from

A. J. Lewis, and the clothing, except that identified by Bowman, at the house of Jonathan D. Ballew, in this county. The bones are the same I got from Sheriff Bush in March last.

THE EVIDENCE FOR THE PRISONER.

December 6.

Thomas T. Bradley. Was on the Coroner's jury that held the inquest over the remains of Golden; saw and examined the hole where they had been buried; think it was dug with a hoe; it could have been dug with the shovel here in court; the hole was under the log where a big limb came out.

Dr. Smith. Am a practicing physician; have been for thirty years engaged in the practice; there is no general rule by which one can tell the height of the person by measuring the re-

mains; can tell about the height; would take the man whose remains these are to have been about five feet eight or ten inches in height.

John Howell. Sold a pair of suspenders to a man named Wilson, which resemble those found with the remains. Wilson lived in Southern Texas, and when the remains were first found they were thought to be his, but Wilson has been heard from.

The verdict of the Coroner's jury was offered in evidence by defendant. Objected to by the State and objection sustained.

December 7,

The order of argument was agreed upon as follows: District Attorney L. F. Smith to open on the part of the State; then Thomas J. Brown and J. W. Throckmorton on behalf of prisoner, and W. G. Ewing of Illinois to close on the part of the State.⁵

DISTRICT ATTORNEY SMITH, FOR THE STATE.

Mr. Smith. Gentlemen of the jury: For ten long days you have patiently listened to the investigation of this most remarkable case, and were it not for the fact that I know you are desirous of doing your whole duty both to the State and and her unfortunate prisoner, I would not ask your attention further, nor trespass upon your time a single moment longer. But when we remember that the defendant, Stephen

⁵ The speeches of counsel, except that of the District-Attorney, were not reported.

M. Ballew, is upon trial for his life, that he stands charged in this court with the heinous crime of murder, and that very soon you will be called upon to perform the solemn duty imposed upon you by the law, as jurors, of saying by your verdict, under the solemn sanction of the oath you took at the commencement of this trial, whether or not he is guilty as charged in this bill of indictment, I am confident you will give me your kind and patient attention, as you have given to the testimony, while commenting upon the evidence as it has been detailed to you by the witnesses, and the law as applicable to that testimony. And, if, in my humble way, I can assist you in arriving at the truth of this painful investigation, then my purpose shall have been fully accomplished and my labor amply rewarded.

Gentlemen, I would state to you frankly, at the outset, that as the representative of the State, in the performance of my official duty, I only ask at your hands a verdict according to the evidence as it has been detailed to you, and the law as it will be given to you by the Court. Outside of the law and the evidence you should not—cannot go, and comply with your obligation as jurors. In testing your qualifications to sit upon the jury, each one of you answered that you had no bias nor prejudice either in favor of, or against the prisoner, and that from hearsay or otherwise there was established in your minds no conclusion as to the guilt or innocence of the defendant that would influence you in finding a verdict. Then we have a right to presume that you will not be governed by prejudice, sympathy, or that more powerful controlling element, public sentiment, but that you will decide this case as every other—according to the law and the evidence.

Neither do I deem it necessary, gentlemen, to remind you of the great responsibility resting upon you. You are all intelligent men and know and appreciate that probably better than I do; yet, allow me to say, it is a responsibility that but few men are called upon to assume, and you have a duty to discharge in this case, the magnitude of which no human tribunal, in my humble opinion, was ever called upon to discharge a greater, or more solemn and painful one. It is true,

in this case, you have been selected according to the laws of our country, to assume the responsibility and discharge the solemn duty of sitting in judgment upon the life of a fellow being. This is surely a solemn thought, yet I have that unbounded and unlimited confidence in the integrity of the human race—the humanity of our laws, and the disposition on the part of the people to punish crime, prevent vice, condemn wrong, and uphold and vindicate right, that I have no fears but what you will discharge your duty fearlessly and conscientiously, leaving that other Tribunal, higher and more just than that devised by man, to judge of the sincerity, wisdom and correctness of your decision.

Let us now examine and closely scrutinize the testimony in this case as it has been detailed by the witnesses, and see whether or not we can arrive at a correct and just conclusion as to the guilt or innocence of the prisoner now upon trial. Gentlemen, we are carried back by the testimony, to many a long year ago, and find that while the prisoner was almost an infant, he was left an orphan, in the State of Kentucky, and that the aunt of James P. Golden, the murdered young man, took him and treated him only as a kind mother can treat her own child; she provided for him when he was not able to provide for himself; she cared for him when he was unable to care for himself; in short, providing him a home when he was homeless and being a mother to him when he was motherless. That is the first account, from the testimony, we have of the prisoner's association with any of the Golden family, and would to God that it had been the last, for then this bitter cup, the very dregs of which the Golden family are now drinking, would have been spared them, and that once happy family would today be living in their pleasant home in the State of Illinois, happy and contented. But, how different their condition! Because the family had been friends, tried and true, to this prisoner when he was left an orphan, friendless and homeless, we find them today grieving over their murdered son and brother—a distracted and miserable family. We see here in this court the old father, the aged and feeble mother, witnesses against the man who is charged with mur-

dering their son, and who, so very recently, became the husband of their dear daughter, who is now driven to almost madness by the conduct of this prisoner. What a terrible picture! Where is the human being, gentlemen, that could not shed a sympathetic tear, I care not how hard his heart or how debased his character, for those heartbroken parents and that daughter—God save the mark! who loved and married the man that had murdered her brother? But I must leave this branch of the subject for I have not the heart to comment upon it.

Mr. Golden, at an early day, left Kentucky and thought to better his condition by moving to what was then the western wilds. He settled where he now lives nearly thirty years ago, as he told you in his testimony, and that after the prisoner grew up he sought his old friends in Illinois, and there he was always welcome, and found in his manhood the same acts of kindness shown him by the Golden family that had been shown in his infancy. Having visited the Golden family quite frequently within the past few years, it was not surprising that in the fall of 1869, he again made his appearance there and engaged board for himself and horse through the fall and winter. Mr. Golden, from the goodness of his heart and the old friendship that existed, told him certainly, and again we find the defendant sharing the hospitality of the family for months without ever being charged a cent. He then pretended that he was getting up a drove of horses and mules to ship south, and persuaded Mr. Golden to send four horses, which he afterwards did. Early in February, 1870, the prisoner left old Mr. Golden's house, with the four head of horses belonging to Mr. Golden, and started on his trip south, stating that he was to get the drove at St. Louis. Remember that while Ballew was living at old Mr. Golden's, young James became a very intimate and warm friend of his, as did all the family of children, including Miss Clara. So intimate was the prisoner that he called Mr. Golden Uncle John and Mrs. Golden Aunt Lizzie. Letters were received from Ballew by different members of the Golden family while he was absent with the stock, several of which letters were written

to young James P. Golden, and have been read to you in evidence for the purpose of showing that many long months before the foul murder of young Golden was perpetrated, the prisoner had deliberately planned the same, and was executing part of the plan by deceiving young Golden as to the amount he was making by trading stock in the South, and persuading him to accompany him on the next trip. Am I mistaken in this matter? I call your attention to the letter written by Ballew to young Golden at Camden, Arkansas, while on his first trip.⁶ You see the language used to young Golden: "You must be sure and get ready to come South with me this fall!" Allow me to ask, for what purpose did this prisoner want young Golden to come South for in the fall? The letter was written in the spring and the fall alluded to was the fall of 1870—the last one for young Golden. Will you believe that it was for the purpose of trading in stock as pretended in the letter? or would you sooner believe that it was for the purpose of firing the mind of Golden with vast speculations, and for the express and hell-born purpose of decoying the unfortunate and innocent young man away from home, from his father and mother, brothers and sisters, with a deliberate, fixed and premeditated design to take his life and rob them of their property? Let the testimony in the case answer, and I submit to you as just and rational men, whether or not every fact and every circumstance connected with this entire transaction, from beginning to end—from the time the prisoner's polluted form and corrupt heart first darkened the quiet and peaceful household of the Golden family in the fall of 1869, down to the time his bloody and malicious hands struck the fatal blow or fired the fatal shot that sent the spirit of young James P. Golden into that mysterious and unknown world above the clouds; do they not go to clearly establish beyond all cavil, beyond all controversy, and all doubt, that he decoyed him to Texas with the fixed and determined purpose of taking his life? Can you believe otherwise? Would to heaven that I could believe differently; that I could believe the prisoner, whose very murderous

⁶ *Ante*, p. 343.

countenance so strongly portrays his guilt, was in fact innocent; and that these bones, and this skull, and clothing found with them, and so thoroughly and unmistakably identified as the skull and clothing of James P. Golden, were not his, and that he was still alive and would soon return to gladden the hearts of this aged and feeble mother and his bereaved and broken-hearted father, and join again his brothers and sisters, who are now clad in mourning for him in the far-distant State of Illinois, there to renew the happy relations of son and brother as in days past, and gladden the hearts of those friends who are sad because he cometh not; and that the circumstances—the unmistakable evidence of nature—pointing so strongly and so consistently to this prisoner as the guilty agent who took the life of Golden, could all be explained away and held for naught. I wish such could be the case, that Golden was alive and this defendant innocent, but from the evidence, I am compelled to believe otherwise, and am confident that every man upon the jury believes that the prisoner is guilty as charged. I am aware that the human heart revolts at the very thought of such a crime as this, and as much as we are inclined to believe that one human being could not pertrate such a crime upon another, as this prisoner stands charged, yet, we are forced to the conclusion even against our will that he is guilty of this most foul and damnable murder.

In the month of August, 1870, we find young Golden, his sister Clara, and this defendant, visiting together in Kentucky. They returned to Illinois, from their visit, about the first of September, and at that time, as the testimony shows, the prisoner had got Golden fully persuaded to accompany him to Texas on a trading expedition. The prisoner at once started over to Missouri to attend to some business, and the express agreement between him and young Golden was that the latter was to purchase and fit up an "outfit," consisting of wagon, horses, harness, etc., and that while Ballew was gone to Missouri, young Golden actually purchased a new "outfit," and was ready to start on his return. Let us now inquire what the prisoner was doing during that time. We

find that he went to Missouri and from there he wrote to John C. Bowman of Collin County, Texas, to be sure and meet him at Jonathan Ballew's on the 15th of October, 1870, to assist him with stock to Shreveport. The letter has been read in evidence,⁷ and shows to my entire satisfaction, and I think to yours, that although it was well known to the writer that Golden was going to accompany him to Texas, yet, it was equally well settled in his mind that he should be disposed of before getting to Jonathan Ballew's house. If such were not the case; if it were not well settled in the mind of the writer of the letter that young Golden should be killed before reaching the point where he wrote for Bowman to meet him, is it not one of the most remarkable and extraordinary occurrences of which you have ever heard, that the prisoner happened to write thus to Bowman and young Golden did in fact disappear—was murdered—before reaching Jonathan Ballew's, and that Bowman, in obedience to the letter, met him at the place designated and assisted him with the stock as requested? Gentlemen, there is no more doubt in my mind, that this defendant, at the time he wrote the Bowman letter, had not only deliberately planned the murder, but had his mind on almost the very spot where it was to be executed than that the sun shines.

The testimony shows—and I shall not knowingly go outside of the record—that on the morning of September 13, 1870, the prisoner and young Golden left the house of John W. Golden, in Adams County, Illinois, and started on their trip to Texas. I imagine, gentlemen of the jury, that I can see them starting now, and hear the many kind parting words—farewell (and a last farewell to young Golden) that greeted them as they slowly drove away, one of them to meet a most terrible death, and the other to be his bloody executioner. After they had gone 200 or 300 yards from the house, the defendant remarked that they would probably need a shovel, and went back and got the one shown and identified here in court. Did you ever hear of such villainy? Not only had he deliberately planned the murder of his victim, but pre-

⁷ See *ante*, p. 338.

pared himself with an implement, many hundreds of miles from where the bloody scene occurred, with which to bury his victim and thus cover up forever, as he thought, his fiendish and hellish crime.

The parties wrote letters back frequently while on the way to Texas. The letters have principally been admitted and read in evidence, and I ask that you scrutinize them closely. I shall briefly allude to them and then leave them with my able associate, Mr. Ewing. One of the letters read in evidence was written by the prisoner to his sister, who lives in Kentucky^s. The parties were then in Southwest Missouri, as you will see from the heading of the letter. After telling his sister that he was well and that James P. Golden was with him, he closes by saying to her, "I hope to be able to settle you in a quiet home on my return." In another letter written to the same party and upon the same trip, while at Baxter Springs, Kansas, he states, "I have things so bunched, that I have no doubt of success this trip." Let us pause for one moment and see if we understand the meaning of those declarations. Let us inquire into the manner in which the prisoner had things "bunched," so that he had no doubt of success, and how he hoped to be able to settle his sister, who is poor and teaches school in Kentucky for a livelihood, in a quiet home on his return. The prisoner had no means and was so miserably poor that old Mr. Golden never thought of charging him for several months' board for himself and horse. The only stock he took South on his first trip were the four head of horses that old Mr. Golden let him have. We have shown that the statements he was writing to young Golden, while on his first trip, about making such a vast amount of money on stock which he pretended to have down here, were all false, and were only calculated to fire Golden's mind and get him to accompany him on the next trip that he might murder him, as he did. Then, again, I ask, how was Ballew to settle his sister in a quiet home? By what means did he expect to do it? How had he things "bunched?" These are very important questions, gentlemen, and in order

^s *Ante*, p. 338.

to see the force of them we must peruse the letter written by the prisoner to his sister at New Orleans, on his return from his trip to Texas with Golden, in which he states, you remember "I have succeeded in business this trip beyond my expectations."⁹

These documents (those notes, deeds, etc.) which have been read in evidence and which were found in the possession of the prisoner upon his return to Illinois, are the unmistakable and uncorruptible evidence of how he was to succeed, and as sure as the sun shines and the earth moves, these same documents he alluded to in his letter to his sister at New Orleans, together with the fact that he had removed the only living witness that could ever appear against his collection of them. Was it necessary that he should kill Golden in order that he could collect those documents, which had been obtained by fraud and crime? I answer that it was. Was it necessary that Golden should be got out of the way to keep this villain from being exposed, arrested and punished? I answer, most certainly so. Then let us inquire how he came in possession of these evidences of debt, and for what purpose, and the consideration he gave for the same. Mr. Golden testified that when the prisoner came back from Missouri he represented to his son James that he had purchased in St. Louis \$22,000 worth of goods and shipped them to Jefferson, Texas; that he stated to James that he had paid \$14,000 cash down on the goods and had got an easy loan on the balance, and that in order for James to become an equal partner, he must secure him to the amount of \$7,000—half the cash outlay. Accordingly, James Golden, upon the mere declaration of the prisoner that he had bought the goods, executed to Ballew his individual note for \$2,000, secured by a deed of trust on his land, worth \$3,000 or \$4,000. Then young Golden executed another note to prisoner for \$5,000, and just as they were going away, the one or the other, Mr. Golden does not remember which, asked him to go his son's security on the note, which he did not like to refuse to do, and hence placed his name on the note along with that of his

⁹ See *post*, p. 340.

son James. That made the necessary \$7,000, all of which was well secured. Then Ballew had given Mr. Golden his note for \$1,500 for the horses taken South on the first trip, which Ballew pretended he had sold on time at Shreveport. Ballew was very anxious that young Golden should take that note along, so he could pay it off when they sold their goods in Texas, and send the money back with James. You remember Mr. Golden went with them as far as Quincy, and after getting there found he had left the note at home—eighteen miles distant. Ballew still very anxious to have it settled up, requested Mr. Golden to write another note and send it along with James and tear the old one up when he went home, which was accordingly done. When the prisoner went back to Illinois, from his trip South with young Golden, he had the \$1,500 note with his name torn off, and reported to Mr. Golden that he had paid the money to his son James, in Texas. Again, the prisoner, through his extreme kindness of heart and generous liberality towards the Golden family, upon his own suggestion, agreed to loan Mr. Golden \$2,500, and stated he would send the money up by James, as soon as they sold their goods in Texas. Mr. Golden told him to express the money to him, as he did care about his son traveling with so much money about him, when the prisoner replied—mark his language—“No, I will send it by James, as it would cost \$200 or \$300 to express it.” When the prisoner returns from that fatal trip, he produces this receipt (holding it up and showing it to the jury) and told Mr. Golden that he had paid the \$2,500 to his son James, as therein stated. Mr. Golden not noticing at the time that the word “first” in the date was in the prisoner’s handwriting, executed to him his individual note for the \$2,500, which the receipt called for, thinking at the time, as he stated on the witness stand, that his son James had been detained longer in Missouri than was expected, and would be home with the money in a few days; the cause of James’ absence being accounted for by the prisoner in the same way. Then at the request of the prisoner, under the lying pretext that shipping the goods had cost more than he expected and that he himself was short of money,

young Golden took with him about \$400 in money. The wagon, horses, harness, etc., were worth some \$600, making the money and property that belonged to young Golden and with which he started South with defendant amount to about another \$1,000. You remember the defendant had nothing, and took nothing along on the trip except a very shabby suit of clothes; the toe of his boots even being worn through. Gentlemen, so far, we find the prisoner upon his return to Illinois from his trip South with Golden, in the quiet, peaceable and apparent honest possession of notes, papers, etc., against the Golden to the amount of over \$12,000. But the greedy monster was not yet satisfied. Immediately upon his return to the home of young Golden, and in order to cover up his infamous crime, and enable him to filch more property from the Golden, he consummated his villainy by fulfilling the previous matrimonial engagement between himself and Miss Clara Golden. We find that he stood at the hymeneal altar in the boots of his murdered victim, and gave in marriage to that sister the very hand that was then reeking with the blood of her brother.

Gentlemen, I have not language strong enough to denounce such a fiend, as he should be denounced, nor language at my command to picture a place in the most bottomless pit of hell hot enough to adequately punish the man who deliberately murdered a brother, then married his sister, and attempted to rob and ruin their father and mother! The world will never fully know the deep damnation of this man's infamy.

Soon after his marriage, we find the prisoner commences complaining, and, for the first time, accuses young Golden with having run off with his money. What money? Why, he says, the money they got for their goods. We find from these letters that Ballew and Golden were writing home that they had sold some of their goods in Sherman and had several fine offers for the rest, and this prisoner of all persons in this broad land knows where they sold them and to whom, and yet we find no witnesses here to establish that they ever had any goods, that they ever received a single cent of money from a man in this State. But, you see, gentlemen, it was

necessary that something should keep Golden away, and hence this slanderous attack upon his character by the man who had killed him, and who held at the same time some \$12,000 worth of notes against the Golden family, which had been obtained by fraud and rascality. The prisoner went so far as to regret having married into a family where one of the members had treated him as young Golden had. He also wanted Mr. Golden to deed him a certain farm, worth \$3,000 or \$4,000, on which he said he could get enough money advanced to commence trading again and make up his loss. The monster still cries more property! And for that, he marries Miss Golden.

As we have already seen, it was the motive of gain that prompted him to take the life of James P. Golden. And while upon the subject of motive, allow me to read to you in the hearing of his Honor, the law upon the subject, from Burrill on Circumstantial Evidence, title motives to crime. You see the law recognizes other motives that prompt the human heart and induce individuals to commit crime, besides those of malice, hatred and ill will. You will doubtless be told by the learned counsel for the prisoner, that there was no motive which induced the prisoner to kill his warmest friend and prospective brother-in-law. But, as I have read from the law, the motive of gain is one of the most powerful ones known to the law writers upon the subject, and the more debased is the character of the person accused, the less the motive which will tempt to the commission of crime. I have already alluded to the manner in which the prisoner succeeded in getting the notes and deeds. The unbounded and seemingly unlimited confidence that young Golden and the entire Golden family had in the prisoner, and the manner in which the base villain took advantage of that confidence by laying a deep and damnable scheme, not only to murder young Golden but to rob his parents of their property. Hence it will not be necessary for me to allude to that portion of the testimony in this connection, but I will ask that you apply the law which I have read to the facts, and then determine the motive that induced Stephen M. Ballew to make the false and

fraudulent representations about the goods to young Golden. The motive that prompted him to persuade young Golden away from his good home and kind parents, by means of falsehoods so base that the very slime from the lying tongue of the miserable wretch who concocted and uttered them, could be seen in the very atmosphere that conveyed them to the ear of his innocent and unsuspecting victim.

Had young Golden lived to get a few short miles further and arrived at the house of Jonathan Ballew, he would have met with a sight and learned facts which would at once have caused him to stop and wonder whether or not his companion was a thief or murderer. There he would have seen his father's horses that the prisoner brought down on his first trip; there he would have learned that the prisoner had not sold the horses as represented to his father; there he would have learned that the prisoner left the horses on his former trip, as his own, to be kept until he came back in the fall; there he would have learned that the prisoner had no other stock on his former trip, save those of his father; there he would have learned that the statements written to him by the prisoner, on his former trip, were base falsehoods, as black as midnight darkness; there he would have discovered the villainy of the man in whom he placed so much confidence, and as an honest young man, as the testimony shows him to have been, he would at once have spurned the man who had so grossly deceived him and practiced such a fraud upon his father. The whole villainous scheme of his companion would at once have been detected. But in order to prevent detection and further his unlawful designs, the prisoner killed him and buried his body in that vast, dense thicket, where, in all probability, no human footprints had ever been seen before, and where, but for a Providential occurrence, they might never have been seen again.

Young Golden never knew that Ballew had any relatives in the county, and hence was not surprised by camping around four or five days in this vicinity. But the prisoner did know it, and yet preferred camping out in disagreeable weather to going, like an honest man, to his relatives. Can you imagine,

gentlemen, why he would camp so long in almost sight of his uncle's house, unless it was to get Golden to write these letters and this receipt, and seeking an opportunity to kill him? Mr. Craig testified that these letters with dates in Ballew's writing are written upon the same kind and texture of paper that the other letters, written by the parties in this vicinity, were, and at no other time and place did they use such paper, as will be seen by the letters. You were told by Mr. Craig that the receipt for \$2,500 and a letter written by Ballew, composed a half sheet of foolscap. The receipt is the top part of the sheet and had been written and torn off before the prisoner wrote his letter on the remainder, dated near McKinney, October 16, 1870. The paper is such as they used in the vicinity of McKinney, and they are all written in that purple ink which has been used all the way down to this place, but never after by prisoner. These are physical facts that cannot lie, and which show as clearly as the noonday's sun where the receipt and letters, dated by Ballew, were written.

Here allow me to anticipate the remarks of the gentlemen for the defense. They will tell you that from Golden's letter to his father, is he condemned, and that he acknowledges that he got the money; that he states in his letter to his father that the prisoner had come up to all he had agreed to do, etc. But when they attempt to cast a stigma over the memory of the murdered Golden, by attempting to brand him as a criminal, and holding him up to the eyes of the world as a felon and a refugee from justice, in order to try to establish satisfactorily to your minds that the prisoner is innocent and should be acquitted, I ask you in the name of bright-eyed truth to call upon them to explain how that letter, along with others, came to be dated by the prisoner and mailed at Shreveport? Ask them to explain to this court and jury, and to the world, how it became necessary, at all, for the prisoner to date Golden's letters, when in one of his, written to old Mr. Golden at the same time and place, he writes, "James is along and will start home in a day or two." Ask

them how it came that the prisoner knew so well the contents of that letter, when in his letter to Mr. Golden, above alluded to, he closes by stating, "I have no news to write as James has told you all about our business." The defendant had seen the letter; he had written the date in it; he inquired of Mr. Golden about it on his return, and wanted a copy, because, as he told Mr. Golden, it was all he had, along with the receipt—which he had also dated—to vindicate himself. That, too, before he was even suspected with having killed Golden. How forcibly he appreciated the fact that he would need vindicating! To say the least of it, he displayed a remarkably early knowledge of the fact, and it illustrates to my mind the truthfulness of the old and often-repeated saying, "a guilty conscience needs no accuser."

Gentlemen of the jury, having shown you, in my humble way, the motive that prompted this defendant to take the life of Golden, and some of the circumstances pointing to him as the guilty party, I now ask your attention, for a few moments, to the facts more intimately and closely connected with the murder. First, I will read to you in the hearing of the court, the definition of murder as defined by the statute, 10 Texas 494, as to murder of the first and second degrees. If there is a specific intention to take life, and life is actually taken, says the law, it is murder in the first degree; if there is not specific intention to take life, and life is taken, then it is murder in the second degree. In this case, the prisoner is either guilty of murder in the first degree, or he is guilty of nothing, and I shall say nothing more about murder in the second degree. Now, gentlemen, let us inquire what is necessary to be proved on the part of the State in order to sustain a conviction. The State must prove, as charged in the indictment—first, the death and identity of the deceased; second, that the deceased came to his death by the unlawful acts of another person; third, that the prisoner was the guilty agent. The first proposition, gentlemen, has been established to the satisfaction of all. The teeth in the skull were identified by the parents, from the peculiarities

and decays in some of them, which satisfies us clearly that the remains are those of James P. Golden. Then the clothing found with the remains, has been identified, even to the peculiar manner of the cut and make, as testified to by Mrs. Golden, leaving no doubt whatever as to the first proposition. Dr. Wiley, a most accomplished gentleman and learned physician, examined the remains at the Coroner's inquest, and again before you. He gave it as his opinion that the person might have been shot through the temples and then the skull fractured by means of some heavy blow with some kind of an instrument, either of which would produce instant death. That the person could not, in any possible way, have fractured his skull in the manner it is, by committing suicide. He gave as his opinion that the fracture in the skull was the cause of the death of the person and that the remains were those of a man about the size the testimony shows young Golden to have been. The doctor made many other important statements which you all remember, satisfying all, that the deceased came to his death by the unlawful act of another person.

Now, for the third and only remaining proposition. Was the prisoner the guilty agent? Here, gentlemen, you see we meet with apparent difficulty, because no eyes, save those of God on high, saw the terrible deed actually perpetrated. What then? Will you say that, because the dark plot of the prisoner was planned within his own malicious and corrupt heart, and because he decoyed his victim far away from friends and human habitations, and there secretly murdered him, that he shall not be punished? No, no, you will not so decide! The laws of man and of nature forbid it. The laws of civilization and of christianity both alike protest against turning a murderer loose unwhipped of justice, because he, as most criminals do, secretly did it. All the allegations in the indictment may be proved, as the court will doubtless charge you, by circumstantial evidence, and the wisdom of the law in permitting it, is so plain, that the wayfaring man, though a fool, may read it at a single glance. By means

of circumstantial evidence we are enabled to arrive at conclusions as correct, and even more so, than by direct evidence; because facts and circumstances never lie. We are enabled by this kind of evidence to detect and punish crime, and by means of which the most secret and atrocious criminals that have ever infested God's earth, or darkened the book of crimes, have been brought to speedy and just punishment. And while we have not produced positive testimony as to the prisoner being the guilty agent that took the life of Golden, yet, we have brought facts and circumstances to bear against him as strong as Holy Writ, and which establishes his guilt to the satisfaction of all reasonable and rational men. We have traced the parties by a description of the wagon, horses, dogs, etc., from the time they started until the prisoner arrived at Jonathan Ballew's. Slowly, but unmistakably, have we traced them, day by day, from place to place, from the time they started, up to the memorable morning of October 21, 1870, when they were seen together for the last time, within 150 yards of the place where the remains of Golden were afterwards found. There, gentlemen, James P. Golden was seen alone with the prisoner for the last time on earth alive. Some half hour or hour after they had been there seen, we find the prisoner with that same wagon and team, with that same faithful gray stallion leading behind the wagon, with Golden's trunk, clothing, hat, and even pocket knife in his possession, driving in a trot over a very rough road, by himself, and occasionally looking back to the place where he and Golden had, but a few moments before, been seen together. He goes to his uncle's and disposes of Golden's effects as his own, and in conversation with young Randolph Ballew, when talking as to how he came down and who came with him, he said, "James Golden intended to come down with me, but something happened and he did not come." How do you account for such language? James Golden intended to come down, but something happened and he did not come! When, at the very moment he uttered those words, in almost plain view of his uncle's house, that dense thicket could be seen,

where he had buried the lifeless, yet, warm body of Golden.

The prisoner seemed very sick when he got to his uncle's. Mrs. Ballew testified that she prepared dinner expressly for him, it being a little past dinner time when he came, and that he went out to the table but refused to eat anything. That his actions were different from what they were on his first trip. That he was excited and restless. That he would not eat any supper in the evening, and only drank a cup of coffee, out in the yard, for breakfast next morning. That he was in very great haste to start, and actually did leave early the next morning after his arrival. How will you account for all this conduct? Can you believe it was natural? No, gentlemen, the answer suggests itself. The spirit of the murdered Golden was hovering around and tormenting him. The blood of the murdered victim, which was then yet warm on the hands of this demon, seemed to cling to him, and brand his every act as the act of a murderer.

Gentlemen of the jury, tell me not, that this prisoner could eat and sleep after perpetrating such a terrible crime; after having killed, in cold blood, the innocent son of Mr. and Mrs. Golden, who had so kindly befriended him in days past; after his murderous eyes had witnessed, and his bloody hands had executed the promptings of his wicked and depraved heart, in taking the life of Golden, without warning, without preparation for death, and without time to even utter a short prayer asking his Heavenly Father to forgive him, through His infinite mercy, for the unbounded and unlimited confidence he had heretofore placed in the vile wretch who murdered him; without giving him time to say farewell—mother—father—brothers—sisters, he will never meet again on earth, but God grant that they may meet on the other side of the dark river—in the world above the sun, where murderers are not permitted to enter. No, it is not strange to my mind that he could not eat and sleep. You remember, the prisoner refused to eat, refused to sleep, was restless and uneasy while at his uncle's, and alleged as a cause for all of it that his sister was sick in Kentucky. He disposed of young Golden's

property, clothing, etc., at low figures, in different ways, and to different parties, and in company with Mr. Bowman left his uncle's house early the next morning, taking with him some of the horses belonging to old Mr. Golden, which he had brought down on the first trip. I wish now to call your attention to the law upon the recent possession of the fruits of crime, as set out in Burrill on Circumstantial Evidence, Phillips on Evidence, and Wharton's American Criminal Law.

The law recognizes the fact that recent possession of the fruits of crime, unexplained, is strong and almost conclusive evidence that the party in whose possession it is found, came by it wrongfully, and especially so, where the articles are of such a nature that the person is bound to know that he has them. In this case we find the prisoner in the recent possession and claiming as his own, all the property of young Golden, including the wagon, horses, guns, trunk, clothing, boots, etc. We find him in very recent possession of Golden's underclothing, socks, handkerchiefs, necktie, and even his pocket knife! The prisoner knows when and where he got them. He knows how and from whom he got them; and while the law does not require him to prove his innocence until his guilt is once established, yet, the law says, with equal force, that when facts have been proved by the State, which constitute an offense, it then devolves upon the accused to establish the facts or circumstances upon which he relies to excuse or justify that offense. No person is required to contradict or explain, says the law, until enough has been proved to warrant a just and reasonable conclusion against him, in the absence of explanation or contradiction; but where such proof has been made, and the nature of the case is such as to admit of explanation or contradiction on the part of the accused, and he offers no evidence to explain or contradict, can human reason do otherwise than adopt the conclusion to which the proof tends. But the law is still stronger, as I have read to you, and as I now repeat in the very language of the law, "That when pretty stringent proof of circumstances is produced (as in this case) tending to support the charge, and it is appar-

ent that the accused is so situated that he could offer evidence of all the facts and circumstances, as they existed, and show, if such were the truth, that the suspicious circumstances can be accounted for, consistently with his innocence, and he fails to offer such; the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge."

Gentlemen, that is strong language and directly applicable to this case. The facts could all be explained by the defendant, if innocent, consistently with that innocence. Show to this court and jury, gentlemen for the defense, that notwithstanding the circumstances and evidences of guilt against the prisoner are almost overwhelmingly against the probability of his being innocent; yet, in order to rebut those circumstances and explain to the entire satisfaction of this jury that the blood of Golden is not upon his hands; come up and show how he came in possession of Golden's effects; how he came to date the letter of Golden, and the receipt; in short, explain away all the circumstances of guilt against him and let this jury know that he is not guilty, as charged in the indictment, of murdering James P. Golden. Could he not explain them away? Yet, not a single witness does he introduce, and not a single effort made to rebut the evidence introduced on the part of the State, which established so strongly his guilt; and that, too, when the life of the prisoner is at issue.

Mr. Bowman went with the prisoner from his uncle's in this county, to the house of Mr. Childers, near Quitman. They traveled hard all day and until after 12 o'clock at night and then this sick man (turning to the prisoner) who could not eat dinner the day before, who could not eat supper the evening before, who could not rest well the night previous, and who could not eat any breakfast that morning, other than drink a cup of coffee out in the yard, wanted to continue on through midnight darkness and swim Sabine River, in order to get further and further away from that accursed spot where he had murdered Golden; the very recollection of which

was haunting his black and guilty conscience still. His conduct was so strange that Childers and his family noticed and talked about it. There he sold Childers that faithful gray stallion, which we have here now, and which has been to us like a beacon of light sent from Heaven to assist in ferreting out this foul crime. Bowman and Childers both testified that there was no such a man along with the prisoner as Golden. That the prisoner never mentioned the name of Golden and never stated a word about going to Jefferson or having goods there, but was making directly for Shreveport. While at Quitman the prisoner mailed to Miss Clara Golden this letter.¹⁰ There it was that he started this message to the young lady who afterwards became his loving wife—the sister of James P. Golden—stating to her that “James is along and seems to be enjoying the trip finely, especially the profits of the trip.” The letter is written in red ink, and a more appropriate color—however distasteful—could not have been selected for the occasion. It resembles blood, and while the innocent sister, to whom it was sent, was not cognizant of the fact, yet, the same hand that guided the pen in making those apparently bloody lines, had, but a few short hours previously shed the innocent blood of her brother.

But I must press on, for already have I consumed too much of your time. The prisoner started from Quitman with Newt. Childers. They went directly to Shreveport, and there the prisoner filled the dates in Golden’s letters, which he had gotten him to write before murdering him, and mailed them at that place, as the postmarks show. He wrote two letters at the same time that he dated Golden’s, and he made the same mistake as to date, in each of his, as he did in all four of Golden’s, dating them November 1, and mailing October 31. The prisoner goes on to New Orleans, and from there, November 6, 1870, he writes to his sister in Kentucky, who was so very sick while he was in Texas, that caused him to hurry away with criminal haste, as follows: “I am well, as usual, and have succeeded in business this trip beyond my

¹⁰ See *ante*, p. 340.

expectations." "I may be in Kentucky next month on business."¹¹ Not a single word said about her sickness. He has no idea of being in Kentucky before next month, and then only on business. Gentlemen, his sister was not sick and he never thought of going to see her after he had got a safe distance from the thicket where Golden's remains were found. Then tell me what hurried this prisoner away from Jonathan Ballew's and out of Texas? The sickness of his sister is the only cause he assigned for it, and that was groundless or he would have had the deposition of his sister, proving that she was in fact sick at the time.

Would you not sooner believe that it was the sudden disappearance of Golden that caused the want of appetite, uneasiness and haste on the part of the prisoner? Will you not believe it was getting Golden's mouth forever sealed in death, and these notes, this deed, and this receipt in his possession calling for many thousands of dollars with no living witness against their collection, that made him write to his sister from New Orleans that he succeeded in business beyond his expectations? There is no other hypothesis by which to account for his conduct. But it does not close here. We follow the prisoner on back to Illinois, and there that same terrible torment seizes him and he cannot eat when young Golden's name is mentioned. You remember the testimony of Mrs. Golden. She told you they were all seated at the table eating dinner and James' name was mentioned by some of the children, when the prisoner left the table, pretending to have a chill. You can never forget the statement she made about the time when the children saw young Mr. Poage coming, and took it to be Jimmy, as they called him. The prisoner had been merrier than common that day until the announcement that Jimmy was coming, and all the children ran out to meet him, and this aged and feeble mother, as she told you upon the witness stand, stood in the door watching and waiting for her long-absent boy to come up. That she herself thought it was Jimmy, and so declared in the presence

¹¹ See *ante*, p. 340.

of the children several times, while Mr. Poage was coming up the lane, and that it was not until he got quite near the house that she discovered her mistake, when with tears in her eyes she turned and went into the house where she found the prisoner lying on the bed—winter time as it was—with great drops of sweat flowing freely from his face and forehead and seemingly in great agony, declaring he had a very severe chill.

The shock was too great for even one whose soul was forever damned with crime, and upon whose brow the brand of Cain was forever and indelibly impressed. It was unmistakably evidence of guilt oozing out through the very pores of his skin, which God, in His wisdom, has created in every being, and which he cannot disguise or prevent, I care not however debased, or however much steeped in crime.

The more we investigate the conduct of the prisoner, the more thoroughly we become satisfied of his guilt; the more we follow him, the more crimsoned becomes his pathway; the more he attempted to account for Golden's absence, the darker his terrible crime became; the more he attempted to explain, the more intricately he became involved, until finally to rid himself of the great and mighty burden that was rapidly crushing him down; to retard the wheels of justice that were rapidly approaching him! to escape the avenging clutches of the law that were then almost ready to grasp him, and in order to check and blind public sentiment which was then becoming so thoroughly aroused against him, we find him driven to that last and dire resort of putting in circulation reports that young Golden had been seen in Missouri; that Miss Smith, who lived in Hancock County, had received a letter from Golden and he was then away out in Colorado Territory; that he himself had assisted Golden in loading mules in Missouri for the Southern market. We find him writing to Golden's relatives in Kentucky, making inquiries about him and cautioning them to secrecy. We find him protesting with Mr. Golden against inquiries being made in Texas, the very last place where Golden was ever seen alive, and the last place from which he ever wrote a letter, under

the miserable subterfuge that had Golden been killed in Texas it would have been published in all the newspapers throughout the country. We find him acknowledging to Mr. Golden that he had circulated reports about having seen his son in Missouri, but said he thought it was the understanding between them that he should do so in order to keep down suspicion. We find him requesting the Golden family to say nothing about the absence of James; that it should be all kept in the family, and as he was the loser, he would say nothing about it if they would do the same. He told Mrs. Golden that if the matter would become known he would take his wife and go off where he would never be heard of. We find him telling Mr. Golden different statements as to where he last saw his son. We find him charging young Golden with having run off with his money, yet he has notes, etc., to the amount of near \$12,000 against the Golden, for which he never gave one single farthing. He wrote to John W. Golden, from Shreveport, that James had all the papers and receipts with him; yet we find on the person of the prisoner at the time of his arrest not only the notes, receipts and deed of trust, but even the warranty deed to Golden's lands, which he had induced Golden to take along on the trip. We find him in possession of all of Golden's property and disposing of it as his own. We have him telling his cousin that James Golden intended to come down, but something happened and he did not come. We have read to you in evidence the letter of the prisoner mailed at Quitman to Miss Clara Golden,¹² in which he states that James is along and enjoying the trip finely; when we have proved that no such person as Golden was with him while there. We have shown that the dates in the Jefferson letters are in the prisoner's handwriting, and that they were mailed at Shreveport one day before they purport to have been written at Jefferson. We have also established that the date in the receipt is the writing of the prisoner. We have proved that the very boots which the prisoner wore when he stood at the hymeneal altar

¹² *Ante*, p. 339.

and gave in marriage to Miss Clara Golden the hand that had murdered her brother, were the boots that he had taken from James P. Golden. We have proved the mysterious disappearance of Golden from the prisoner and his conduct relative thereto. We have proved that Golden's remains were found some four months afterwards within 150 yards of where he was last seen with the prisoner and the last time ever seen alive. We have identified his body, together with the fact that he met death by violence at the hands of another person. In fact, we have brought together such a chain of circumstances so closely connected and interwoven together that they establish so unmistakably the guilt of the prisoner that the most doubtful can have no possible doubts in regard to his being the person who took the life of James P. Golden, and yet, you will be asked by the prisoner's counsel, whether you have not some lingering doubt as to the guilt of the prisoner, and if so, that you must give him the benefit of it. Of course, gentlemen, you could raise some imaginary doubt about every transaction relating to human affairs, if you were so disposed, but that is not such a one as the law contemplates by reasonable doubt. The doubt, in order to acquit, must be actual and substantial, not mere possibility or speculation. You must remember that you cannot disbelieve as jurors and believe as men, for the law says whatever amount of evidence it takes to satisfy you as men, must satisfy you as jurors. Now, let me ask each of you as men, are you not satisfied to a moral certainty that Stephen M. Ballew, as charged in the indictment, took the life of James P. Golden? If you are, then go to the jury room and with that moral courage which characterizes the acts of honest men, return a verdict according to your honest convictions, however hard it may be to do. Do not falter, I beg you, when the hour for action comes.

Gentlemen of the jury, so far as I am concerned, I will now leave this case with you, asking, as a last request, that you give the able gentlemen who represent this unfortunate prisoner, that patient and close attention which you have so kindly given to me, and for which I now return to each one of you my kindest thanks. And for my talented friend and

associate in this long and laborious case, Mr. Ewing, who will close on the part of the State, I would ask that same kind, patient, indulgence which, to me, has so remarkably characterized your conduct throughout this entire investigation. To him is due all the honor of having ferreted out, and of being instrumental in bringing to the throne of eternal justice, one of the most foul murderers that ever shed the blood of his fellow man, or that ever made footprints upon Texas soil. He has traveled many hundreds of miles in the accomplishment of this herculean task, and as to whether he has performed his duty well or not, I leave the result to show. For the first time, in life, will his voice be heard before a Texas jury, pleading the cause of law and order, which in this case have been so grossly violated and so greatly outraged; and I ask for him, again, your kind and patient indulgence. Do your whole duty in the fear of God and without the fear of man. Do not sacrifice, I beseech you, the cause of justice to that of mercy. When mercy is asked on behalf of the prisoner, I ask you to remember the innocent blood of James P. Golden. That you remember the terrible suffering and distress brought upon the Golden family. That you remember the ruin wrought upon that poor, emaciated and stricken sister, who is the shivering victim of this prisoner's cruelty, perfidy and crime. Remember justice first, and then remember mercy; and if, by so doing, you say by your verdict, as I am ever confident you will, that the prisoner, Stephen M. Ballew, is guilty of murder in the first degree in taking the life of James P. Golden, and that he shall suffer the most extreme penalty of the law upon the gallows, no one under the sound of my voice will acquiesce in your verdict more readily than I, and no one in all this broad land will be more readily prepared than myself, to exclaim with you, when that verdict is rendered, so be it.

JUDGE ANDREWS' CHARGE.

JUDGE ANDREWS. I instruct you, gentlemen of the jury, that this indictment, divested of its formal words, charges

the defendant with the killing of one James P. Golden, with a fixed, sedate and deliberate purpose to take his life.

Homicide is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another. By the "Penal Code" of this State, murder is defined as follows: "Every person with a sound memory and discretion, who shall unlawfully kill any reasonable creature in being, within this State, with malice aforethought, either express or implied, shall be deemed guilty of murder." Murder is distinguishable from every other species of homicide, by the absence of the circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide.

All murder committed by poison, starving, torture, or with express malice, or committed in the perpetration, or in the attempt at the perpetration of arson, rape, robbery, or burglary, is murder in the first degree, and all murder not of the first degree is murder of the second degree.

Express malice is when one with a sedate, deliberate mind, and formed design, kills another, which formed design is shown by external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, former grudges, or concerted schemes to do him some bodily harm.

The person killing must be of sedate, deliberate mind; must be sufficiently self-possessed as to comprehend and contemplate the consequences of his acts; his acts must not be the result of a sudden, rash, inconsiderate impulse or passion.

When the homicide is established, the law implies malice in the killing, and declares the homicide to be murder of the second degree, until the evidence establishes "express malice," or that the life was taken in the perpetration, or in the attempt at the perpetration of arson, rape, robbery, or burglary, then it is murder of the first degree; or until the evidence shows circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide.

If you believe from the evidence adduced, that this defendant, Stephen M. Ballew, as he is here charged, did mur-

der James P. Golden, in Collin County, Texas, or any day prior to the 29th day of March, 1871, the day of the filing of this indictment, you will find him guilty, and you will also find the degree of the murder, and then assess the punishment.

The punishment for murder of the first degree is either death, or confinement in the penitentiary for life. The punishment for murder of the second degree is confinement in the penitentiary for such a term of years as the jury may assess, not less than five.

The State having introduced the declarations of the defendant, is bound by them, so far, unless they are shown to be false, by either direct or circumstantial evidence.

The defendant is presumed to be innocent until his guilt is established by legal evidence, which may be either direct or circumstantial. If you have a reasonable doubt of the guilt of the prisoner, it is your duty to him, to yourselves, your country, and your God, to find him not guilty. The doubt that will justify this verdict must be actual and substantial, not mere possibility or speculation. Everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. The certainty which will justify a verdict of guilty, is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can say that they feel an abiding conviction to a moral certainty of the truth of the charge.

Gentlemen of the jury, after eleven days of patient labor, we approach the end of this trial. To the Court is assigned the duty of explaining to you the law, but you, and you alone, under the law and the evidence as given you can, and must, decide upon the guilt or innocence of the prisoner at the bar. Impartial as I know you are, being guided alone by the law and the evidence, your conclusion, whatever it may be, will commend itself not only to your own sense of justice and right, but also to the severer judgment of that Being before whose Bar we must all stand hereafter to be judged.

You will now proceed to the discharge of your solemn duty.

THE VERDICT.

December 8.

At 10 o'clock the *jury* came into court and announced that they had agreed upon a verdict. The COURT ordered the names of the jurors called and they all answered. The *foreman* then handed their verdict to the clerk, who read it aloud: "We, the jury, find the defendant, Stephen M. Ballew, guilty of murder in the first degree, as charged in the bill of indictment, and assess his punishment at hanging by the neck until he is dead. Martin W. Gentry, Foreman."

December 9.

The *Counsel for the prisoner* today made a motion for a new trial, and on the motion being denied by the COURT, an appeal was taken from the District Court upon a writ of error to the Supreme Court held at Austin, where the case was held until the 8th day of April, 1872. The convict again attempted to effect his escape from the jail, which he came near accomplishing about the 1st of February. He had freed himself of his fetters and was ready to escape a second time had it not been for the timely discovery by the keeper of the prison.

THE SENTENCE.

April 13, 1872.

The Supreme Court eventually confirmed the finding of the court below, and ordered the Judge of the Eleventh Judicial District to pass sentence in accordance with the finding of the jury.¹³

JUDGE ANDREWS. Sir: At the last term of this court, after a protracted, impartial trial, you were, by a jury of your

¹³ State v. Ballew, 36 Tex. 98. The COURT's written opinion closed in these words: "In view of the fact that the conviction was had upon circumstantial evidence alone, and the bare possibility that those circumstances may have led to an erroneous judgment in this case, we recommended for this appellant, the exercise of Executive clemency, in the commutation of the sentence to imprisonment for life."

own selection, found guilty of murder in the first degree, and your punishment assessed at death—for the highest crime known to the law you were adjudged to suffer the severest punishment known to human tribunals. From this judgment you prayed an appeal to our Supreme Court, which, removed from all possibility of prejudice, upon full examination of your case, affirmed the judgment of this court.

Therefore, in obedience to the mandate of our said Supreme Court, which is now upon the file in this court, it becomes my solemn and painful duty to pronounce upon you the sentence of the law, in pursuance of verdict of the said jury, by which you are to pass from time into eternity. Before doing so, I would recommend to you that you devote the short time yet allowed you by the law, to a preparation for your appearance before that Great and August Tribunal, whose Judge is infallible.

Have you any lawful reason to offer why this awful sentence should not be now pronounced?

It appearing to the Court that you have no legal reason to offer, it is ordered by this Court that you be remanded to the custody of the Sheriff of Collin County, to be by him safely kept until Friday, the 24th day of May next, 1872, when, in pursuance of the judgment of this Court, and in obedience to the mandate of our said Supreme Court, you shall, by said Sheriff, within the hours prescribed by law, be hanged by the neck until you are dead.

May you be enabled, in the meantime, to obtain pardon from your sins, and salvation for your soul.

The prisoner received his sentence very coolly and smiled as the Sheriff was returning him to prison.

The next and last effort to save the prisoner from meeting his just punishment, was an application to the Governor for a commutation of the sentence to confinement in the penitentiary for life. Governor Davis replied to this appeal on April 2, as follows:

"In this case I have examined as carefully as possible the statements of facts shown on the trial of applicant, and I must conclude that he in some way has taken the life of Golden. He has made no confession nor any acknowledgment on the subject, but he certainly must know something of the manner of Golden's death. He is last seen with Golden a short distance from where a body has

been found, that seems strongly identified as Golden's body. Just after, he is seen (near where the body is found) in company with Golden, he turns up at his (applicant's) uncle's house a few miles from where he and Golden are seen together with the horses, team, etc., and trunk and clothes of Golden. He then pretends that Golden had given up the trip and remained at home in Illinois. There can be no doubt that he had killed Golden.

The Judges of the Supreme Court who have recommended a commutation of his sentence, inform me that their reason for doing so was because it seemed to them possible that he had killed Golden in some dispute or personal encounter. The Judges do not have any doubt of the actual killing.

I, however, cannot imagine from all attendant circumstances that this can have been the case. One sufficient objection to the hypothesis is seen in the circumstances that applicant has not himself pretended it; accordingly, I must conclude that Stephen M. Ballew is fully guilty of the crime of murder, and without any palliation.

I therefore decline to interfere; and direct that the proper officer proceed to carry out the sentence."

After the conviction the citizens of McKinney held a meeting for the purpose of offering a tribute of respect to Mr. Ewing and Mr. and Mrs. Golden, on the occasion of their departure for home. After drafting a set of resolutions expressive of sympathy for the bereaved parents, and thanks to W. G. Ewing, for his able services in the important trial just closed, a number of prominent citizens, accompanied by the McKinney Brass Band, proceeded to the hotel and serenaded the parties, playing "Welcome, Lafayette," and other national airs, after which John Murray stepped forward and made a few remarks appropriate to the occasion, and in behalf of the citizens, presented Mr. Ewing and Golden each with a cane of McKinney material and workmanship. These canes are made of Bois d'Arc wood of native growth. Mr. Ewing's cane is a perfect model of beauty and symmetry, mounted with an elaborately wrought gold head, octagon in shape, with the following engraving on the plain surfaces forming the angles: "Presented to W. G. Ewing, Esq., of Quincy, Ill., by the citizens of Collin County, Texas, in appreciation of the able manner in which he prosecuted the Ballew murder case," and on top or crown is represented the emblematical Lone Star, with five points, at each point one of the five letters, T E X A S, and in the center, 1871, a beautiful design, well executed. Mr. Golden's cane is mounted with a massive silver head, simply with his name, John W. Golden, May 24, 1872, the date of the execution, the engraving having been deferred until after that event took place. On the following morning, they took leave of many warm friends, and started for their distant home in Illinois, where they arrived in safety. On arriving at home Mr. Golden caused the following card of acknowledgment to be inserted in the Quincy Herald:

"John W. Golden desires us to express the thanks of himself and wife to G. W. Cameron, Deputy Clerk of the District Court at McKinney, Texas; Judge Andrews, District Attorney Smith, Gov. Throckmorton, Captain Brown, T. H. Murray, merchant at McKinney, and the citizens generally of the town of McKinney, and Collin County, Texas, for the many courtesies and kind treatment extended to them during their recent visit to Texas to attend the trial of Stephen M. Ballew, charged with the murder of their son, James P. Golden. They were shown every attention, and citizens vied with each other to make their visit as pleasant as was possible under the sad circumstances, opened their hearts and homes, and exerted themselves to make the father and mother prosecuting the murderer of their son forget they were among strangers. Mr. and Mrs. Golden will never forget the treatment they received, and will always remember with pleasure the kind, warm hearts in the town of McKinney, and Collin County."

For some days previous to the execution, the condemned Ballew had been removed from the dungeon to an upper room of the jail, in the rear of the Sheriff's office, where he was securely chained to a ring fixed in the center of the floor, and to make his safekeeping doubly secure, a guard of four men kept watch day and night. The prisoner steadily refused to make any declarations as to his guilt or innocence, but stated to Sheriff Bush on several occasions that he would tell all, were it not for two things, but refused to state what the two reasons were. On May 22, Rev. Mr. Hall, a minister of the Christian Church, visited the prisoner for the purpose of administering spiritual consolation; after conversing a short time Ballew said that he had some secrets to disclose and exacted a promise from Hall not to divulge them until after his demise. This lead Hall to believe that the condemned man was going to make a clean breast of his crimes, but instead of that he turned his conversation to some frivolous matter foreign to the subject, and in an evasive manner said that he had something to impart but that he would reflect upon the matter. That ended the interview.

THE EXECUTION.

May 24.

The multitude commenced to congregate by sunrise today, coming to town by every avenue of approach and by every mode of conveyance, from the finest barouche down to an ox cart, horseback and afoot, and by 12 o'clock fully 4,000 persons were on the grounds. At this time the prisoner requested Sheriff Bush to furnish him with a good square meal, who asked him what he preferred, to which he replied, "As it would be his last dinner, he would take a regular old-fashioned Kentucky dish of bacon and green beans with corn bread." The Sheriff complied with his request. After partaking of this, his last earthly feast, a barber was summoned to the cell and his services brought into requisition, who shaved and dressed his hair. Donning the same boots and hat,

the same suit of black cloth that he wore on the trial, he remarked to his guards while dressing that he was a man of taste. The history of this black suit is so strange as to require more than a passing notice. This suit, coat, vest and pants were originally bought of Mr. Jacobs, clothing merchant of Quincy, Ill., and paid for with the proceeds of the murder. After wearing them at his wedding he is then found wearing them through all the various stages of his examination, trial, conviction, sentence, execution and burial.

The execution had been anticipated by the public with more than ordinary interest. The crime for which the condemned man was executed was of such a horrible character that the sentiment of the community generally was that he was meeting with a just and only adequate punishment. There was an intense curiosity manifested to see the execution and hear what the prisoner had to say.

At half past one o'clock p. m. Sheriff Bush and his deputies placed the accused in a wagon which contained his coffin and escorted by a strong guard, marched to the place of execution, south of town. On reaching the gallows he proceeded to mount the scaffold, where he seated himself on the railing, smoking a cigar. His face wore a sullen, determined look, and after he scanned the vast multitude of three or four thousand persons without catching the glance of a pitying eye, he defiantly set his eyes on some object above the heads of the spectators and kept them steadily fixed.

Sheriff Bush said: "The prisoner, S. M. Ballew, who is now before you, and whom you have met to see executed, declines to make any remarks upon this occasion. Fellow citizens, may this be a warning, not only to those within the sound of my voice but to the world. This is one of the many painful duties of your humble servant, though when I accepted the office of Sheriff of Collin County, I accepted this duty and there remains nothing left for me to do but to carry out the sentence of the Court. May the God of heaven have mercy upon this poor, unfortunate man, is my prayer.

The Sheriff then proceeded to adjust the cap and rope. At 20 minutes to 2 the drop fell and Stephen M. Ballew was dangling between Heaven and earth. The fall failed to break the neck and convulsive struggles were visible for some minutes. After swinging twelve or fifteen minutes it was found that the noose fitted so loosely as to admit air into the lungs, whereupon the body was slightly raised and the rope readjusted. He was allowed to swing about thirty minutes when the body was cut down and placed in a coffin. He had made no confession whatsoever as to his guilt.

THE TRIAL OF JOHN STUYVESANT FOR FALSE PRETENSES. NEW YORK CITY, 1819.

THE NARRATIVE.

John Stuyvesant one evening many years ago met Peter McIntyre in a New York Hotel, and when the latter good naturedly spoke to him as an acquaintance, he requested him to cash a small check for him, saying that he could get the money in the morning. Peter readily did so and John politely took his leave. Next morning, there came a note from John, saying that he had not been able to get the money he expected to meet the check and asking Peter not to present it that day. But Peter went to the bank, nevertheless, and when payment was refused, had John arrested, and a jury indicted him and he was tried for obtaining money under false pretenses. But he was acquitted, because the Judge told the jury that a representation to be a crime must relate to an existing fact. John had not said he had money in the bank that night, but only that there would be money there next day.

THE TRIAL.¹

In the Court of General Sessions, New York City, December, 1819.

HON. CADWALLADER D. COLDEN,² *Mayor.*

December 16.

The prisoner, John Stuyvesant, had been previously indicted³ by the Grand Jury for obtaining a sum of money by

¹ New York City Hall Recorder. See 1 Am. St. Tr. 61.

² See 1 Am. St. Tr. 6.

³ The indictment alleged, that on that day the prisoner unlawfully, knowingly, and designedly, did falsely pretend and exhibit to the said Peter McIntyre, a certain bank check or order for the payment of money, then in the possession of the said John Stuyvesant, and which said order for the payment of money was in the words and figures following, to-wit: "New York, 4th October, 1819. Cashier of the Mechanics' Bank, pay to Mr. McIntyre, or

false pretenses, the property of Peter McIntyre, in the City of New York, on October 3. He pleaded *not guilty*.

P. C. Van Wyck,⁴ for the People.

John Rodman,⁵ for the Prisoner.

THE EVIDENCE.

Peter McIntyre. On the evening of 3d of October, the prisoner came to Washington Hall, a public house kept by me, and saluted me very civilly. I thought I knew him, supposing him to be a gentleman who kept a store in the neighborhood. Prisoner asked me for a blank check, which on receiving, he filled up and subscribed his own name. He then turned round, apparently to go out with the check, when he said to me, Mr. McIntyre, perhaps you can let me have the money for this check? I replied that I could, and did so. After-

wards, and as the prisoner was going away, he said that I could get the money for the check in the morning. He then very civilly took his leave; and no further conversation passed. In the morning I received a note from the prisoner intimating that he had been disappointed in his expectations of putting funds in the bank to meet the check, and requesting that I would not present it that day. The check was presented to the bank, and payment was refused for want of funds.

Mr. Van Wyck declared that he had no other testimony to offer.

The MAYOR instructed the jury that the testimony, as it then stood before the court, did not afford evidence of a false pretense.

bearer, ten dollars. Jno. Stuyvesant," as and for a good check or order upon the Mechanics' Bank, in the City of New York, for the payment of ten dollars, as being of the value of ten dollars, and as being the check of a person who kept an account at the said bank. That McIntyre, believing the false pretense, and that the check was good for ten dollars, was induced, by reason of the said false pretense, to deliver and did deliver to the said John, ten dollars; whereas in truth and in fact the said check or order was not a good check or order for the payment of ten dollars, nor was it of any value whatever; and whereas, in truth and in fact, the said John had no funds whatever in said bank, and kept no account whatever there; and whereas, in fact and in truth, the said John well knew, etc.

⁴ See 4 Am. St. Tr. 547.

⁵ RODMAN, JOHN, District Attorney for the Twelfth District (New York County). 1815-1817. (New York County was formed Mch. 24, 1815). See 1 Am. St. Tr. 826.

A false pretense must be the false representation of some existing fact; and in this, a false pretense differs from a false promise.

Here the prisoner made no representation as to an existing fact; certainly he made no such representation before he obtained the money. But if there was any false pretense, it was the declaration of the prisoner that the witness could get the money for the check in the morning. But this was not a representation that a fact existed which did not exist. This declaration is perfectly consistent with an intention which the prisoner might have had, to put funds in the bank to meet the check. Had the prisoner represented that the money was actually in the bank to meet the check, the case would be different from what it now is.

If the proper distinction between false pretense and false promise is not preserved, there will be no limitations in cases of this nature; we should then be obliged to say that every man who lawfully overdraws his bank account or who gives a promissory note when he has neither the means, nor the prospect of having means, to pay, may be punished criminally. Perhaps it ought to be so; but it must be for the legislature, and not for a court, to determine whether such immoral conduct shall be placed on the catalogue of our crimes.

But there is another objection to the sufficiency of the testimony in this case, to support the indictment. It cannot be doubted that it is a rule that the goods or money must be obtained by the false pretense. Now, whatever pretense was made by the prisoner, was made after he had actually obtained the money. It is impossible to say, therefore, that the money was obtained by means of the false pretense. Indeed, the witness does not assert that it was; it is evident that he was deceived by the genteel appearance of the prisoner, mistook him for one of his neighbors, and, on that ground, parted with his money. If, therefore, there was a false pretense, the money was not thereby obtained; and, on this ground alone, the prosecution cannot be supported.

The *Jury* returned a verdict of *not guilty* and the prisoner was discharged.

THE TRIAL OF JOHN FRANCIS KNAPP FOR THE MURDER OF JOSEPH WHITE. SALEM, MASSACHUSETTS, 1830.

THE NARRATIVE.

Joseph White, one of its wealthiest and most-respected citizens, was found murdered in his bed one morning in the spring of 1830, in his mansion house in Salem, Massachusetts. Physicians, who examined the body, discovered thirteen deep stabs made as if by a sharp dirk or poniard and the appearance of a heavy blow on the left temple. The body was cold and appeared to have been lifeless many hours. No valuable articles had been taken nor the house ransacked for them; though there was a quantity of coin in an iron chest in his chamber, and costly plate in other apartments, none of it was missing. The perpetration of such an atrocious crime, in the most populous and central part of the town and under circumstances that indicated the utmost coolness, deliberation and audacity, deeply agitated and aroused the whole community. Large rewards for the detection of the murderer were offered by the heirs of the deceased and by the Governor of the State. The citizens held a public meeting, and appointed a committee of vigilance.

While the public mind was thus excited and anxious, it was announced that a bold attempt at highway robbery had been made by three footpads, on Joseph J. Knapp, Jr., and John Francis Knapp while they were returning in a chaise from Salem to their residence in Wenham, a neighboring town. They appeared before the investigating committee, and testified to this, but not the slightest clue to the murder or the robbery could be found, and the mystery seemed to be impenetrable.

At length, a rumor reached the Vigilance Committee, that a prisoner named Hatch, in jail at New Bedford, seventy miles from Salem on a charge of shoplifting, had stated that,

some months before the murder, while he was at large, he had associated in Salem with one Richard Crowninshield, Jr., and had often heard Crowninshield express his intention to take the life of Mr. White. Crowninshield was a young man of bad reputation, though he had never been convicted of any offense. Hatch was carried in chains from New Bedford before the Grand Jury and on his testimony an indictment was found against Crowninshield. Other witnesses testified that, on the night of the murder, his brother George, Benjamin Selman of Marblehead and Daniel Chase of Lynn were together in Salem at a gambling house usually frequented by Richard; they were indicted as accomplices in the crime.

About two weeks after the arrest of this desperado and his companions, Captain Joseph J. Knapp, a shipmaster and merchant of good character, received a strange note from a man in Belfast, Maine, signing himself Charles Grant, Jr., which threw out vague intimations and threats of exposure if a demand for money which the note conveyed was not complied with. The writer of this mysterious letter said: "I merely tell you that I am acquainted with your brother Franklin, and also the business he was transacting for you on the 2nd of April last; and that I think that you was very extravagant in giving one thousand dollars to the person that would execute the business for you."¹ This letter was a complete riddle to Captain Knapp, and he showed it to his son, N. Phippen Knapp, a young lawyer of Salem, who was equally at a loss to understand its meaning. Captain Knapp then consulted his other sons, John Francis Knapp and Joseph J. Knapp, Jr., who resided in Wenham, the wife of Joseph J. Knapp, Jr., being a daughter of a niece of Mr. White, who had acted as his housekeeper prior to the murder. When the letter from Grant was shown to the son Joseph, he said it "contained a devilish lot of trash," and told his father to hand it over to the Committee of Vigilance, which he did. This blundering disposition of the letter on the part of young Joseph Knapp was the first step in a train of evidence which brought himself and his brother to the gallows.

¹ *Post*, p. 438.

The next day J. J. Knapp, Jr., went to Salem and requested one of his friends to drop into the post office there the two following letters:

"May 13, 1830.

"GENTLEMEN OF THE COMMITTEE OF VIGILANCE:

"Hearing that you have taken up four young men on suspicion of being concerned in the murder of Mr. White, I think it time to inform you that Stephen White came to me one night and told me if I would remove the old gentleman he would give me five thousand dollars; he said he was afraid he would alter his will if he lived any longer. I told him I would do it, but I feared to go into the house. So he said he would go with me; that he would try to get into the house in the evening and open the window; would then go home and go to bed and meet me again about eleven. I found him and we both went into his chamber. I struck him on the head with a heavy piece of lead and then stabbed him with a dirk; he made the finishing strokes with another. He promised to send me the money the next evening, and has not sent it yet, which is the reason that I mention this."

"Yours, Etc., Grant."

"Lynn, May 12, 1830.

"Mr. White will send the \$5,000, or a part of it, before tomorrow night, or suffer the painful consequences.

"N. Claxton, 4th."

This second letter was addressed to the "Hon. Stephen White, Salem, Mass."

When Knapp delivered these letters to his friend, he said his father had received an anonymous letter and "what I want you for is to put these in the post office in order to nip this silly affair in the bud." The Joseph White mentioned in these letters was a nephew of Joseph White, a State senator, and the legatee of the principal part of his large property.

No sooner had the Committee of Vigilance received Grant's letter, than they sent a messenger to Maine to find out the writer. He proved to be one Palmer, who had served a term in the State prison, and had associated with the Crowninshields during part of the preceding winter. On the 2nd of April, he said, he saw Frank Knapp and a young man by the name of Allen ride up to the house, and afterward go away in company with the Crowninshields; and when they returned, he heard George Crowninshield tell Richard that Frank Knapp wished them to undertake to kill Mr. White,

and that J. J. Knapp, Jr., would pay them one thousand dollars for the job. Palmer said he had been asked to be concerned in the matter, but had declined.²

A warrant was issued against Joseph J. Knapp, Jr., and John Francis Knapp, and they were taken into custody at Wenham, where they were residing in the family of Mrs. Beckford, mother of the wife of Joseph J. Knapp, Jr. The two Knapps were young shipmasters of a respectable family. They were called familiarly Joe and Frank.

Joseph J. Knapp, Jr., on the third day of his imprisonment made a full confession. He said he knew that Mr. White had made his will and given to Mrs. Beckford a legacy of fifteen thousand dollars, but if he died without leaving a will, he expected she would inherit nearly two hundred thousand dollars. In February he made known to his brother his desire to make away with Mr. White, intending first to abstract and destroy the will. Frank agreed to employ an assassin and negotiated with Richard Crowninshield, Jr., who agreed to do the deed for a reward of one thousand dollars. Joseph agreed to pay that sum; and, as he had access to the house at his pleasure, he agreed to unfasten the back window, so that Crowninshield might gain entrance. Four days before the murder, while they were deliberating on the mode of compassing it, he went into Mr. White's chamber and, finding the key in the iron chest, unlocked it, took the will, put it in his chaise box, covered it with hay, carried it to Wenham, kept it till after the murder and then burned it. After securing the will, he gave notice to Crowninshield that all was ready.

On the evening of that day he had a meeting with Crowninshield, who showed him a bludgeon and a dagger, with which the murder was to be committed. Knapp asked him if he meant to do it that night; Crowninshield said he thought not, he did not feel like it. Knapp ascertained on Sunday, the 4th of April, that Mr. White had gone to take tea with a relative in Chestnut street. Crowninshield intended to stab him on his way home in the evening, but Mr. White returned before

² *Post*, p. 436.

dark. It was next arranged for the night of the 6th, and Knapp was on some pretext to prevail on Mrs. Beckford to visit her daughters at Wenham and to spend the night there. All preparations being thus complete, Crowninshield and Frank met about 10 o'clock in the evening of the 6th, in Brown street, in the rear of the garden of Mr. White, and stood some time in a spot from which they could observe the movements in the house, and perceive when Mr. White and his two servants retired to bed. Crowninshield requested Frank to go home; he did so, but soon returned to the same spot. Crowninshield in the meantime, had climbed in at a window, entered the sleeping chamber and given Mr. White a mortal blow on the head with a bludgeon, and with a dirk a number of stabs in the body. He then left the house, hurried back through Brown street, where he met Frank waiting to learn the event, hid the club under the steps of a meeting house and then went home to Danvers.

Joseph confessed further that the account of the Wenham robbery was a sheer fabrication. After the murder Crowninshield went to Wenham, in company with Frank, to call for the one thousand dollars. He was not able to pay the whole, but gave him one hundred five-franc pieces. Crowninshield related to him the particulars of the murder, and told him where the club was hid. Joseph sent Frank afterwards to find and destroy the club, but he said he could not find it. When Joseph made the confession, he told the place where the club was concealed, and it was there found. Joseph admitted he wrote the two anonymous letters. Crowninshield first maintained a stoical composure, but when informed of Knapp's arrest, he broke down and on the 15th of June committed suicide by hanging himself in his cell.

A special term of the Supreme Court was held at Salem, on the 20th of July, for the trial of the prisoners charged with the murder, and the Attorney-General obtained the assistance of Daniel Webster in the prosecution. An indictment for the murder was found against John Francis Knapp, as principal, and Joseph J. Knapp, Jr., and George Crowninshield as accessories; Selman and Chase were discharged.

The principal, John Francis Knapp,³ was first put on trial. As the law then stood, the accessory in a murder could not be tried until the principal had been convicted. The trial was long and arduous and the witnesses numerous. His

³ The two brothers Knapp, who were hanged for the murder, were sons of a respectable sea captain of the neighborhood and one of their brothers was a member of the bar. In the Essex Institute Library at Salem is a curious and interesting pamphlet entitled "Wild Achievements and Romantic Voyages of Captain John Francis White," relating to the younger brother, Frank, who, although only 19 years old, had already been in command of a ship. Says the writer (whose dates are astray, as Napoleon died in 1821):

"The first voyage made by John Francis Knapp was in the autumn of 1822. Having robbed his father of a considerable sum of money about this time, it was deemed advisable, in order to hush up the affair, to send him on a voyage to the East Indies. This pleased Frank much, as he had always expressed a desire to become a sailor, and the darling wish of his heart was now to be gratified. When quite young, he was excessively fond of the sea, and most of his leisure hours were employed in sailing little boats in a pond adjoining his father's dwelling. His ideas of the ocean were at this time, however, indistinct and shadowy. He had never seen the angry elements while in commotion, and was therefore unable to form any opinion of the grandeur of such a scene. When about twelve years of age he once crossed Lynn beach with some members of his family on their way to Nahant. It was there he first had an unrestricted view of the great ocean. He has often said it did not altogether accord with the ideas he had formed of its tremendous magnificence; yet he could not but admit it was wonderful—most wonderful. Its appearance on this day was not tempestuous, but troubled. The blue waves rose and fell like the heavings of an unquiet bosom. They fretted themselves to foam as a fiery horse when driven against his will. But to our subject:

"Everything being ready, we started from Salem in the ship *Endicott* on the 14th of October, 1822. Nothing occurred for a fortnight worthy of note. . . .

"After an absence of seven months we arrived at Salem, having made a very profitable voyage for the owners. The ship was thoroughly repaired and a new crew shipped. Knapp went out as captain, and I as supercargo. We were bound to the coast of Africa on a trading voyage, and none but the most experienced seamen were shipped, as it was considered a dangerous voyage. All things being ready, we again set sail in August, 1823. . . .

"We continued our course, and the next day hove in sight of St. Helena, where Buonaparte was confined by the English nation. This island is situated in latitude 15 deg. 55 m. S. and longitude 5 deg. 46 W. in the southeast trade wind. We cast anchor about a mile from the shore. Captain Knapp and seven of the crew,

brother Joseph, who had made his confession on the government's promise of immunity, if he would, in good faith, testify to the truth, was brought into court, called to the stand as a witness, but declined to testify.

including myself, took the boat and made for the island. An officer on guard conducted us to Sir Hudson Lowe, the Governor, who granted us permission to visit Buonaparte at Longwood. We accordingly took a guide, and were conducted, very politely, to his apartments. He was reading, on our entrance, but on seeing us, rose and received us with much politeness. After an introduction had taken place, and a few common remarks had been made, we rose to depart. Napoleon requested Frank Knapp to remain. He did so, and the rest of us roamed about the island till night. The conversation on the part of Napoleon, Frank has observed, related mostly to the wrongs and persecutions he had received from the English nation. Tell your countrymen, said he, on your return, I trusted in my utmost need to British honor, and found it but a name. I threw myself on the protection of their flag, and they basely and treacherously refused to act towards me as a high-minded people, under such circumstances should have acted. I venerate the country, added Napoleon, which gave birth to Washington and Jackson, and only regret it was not in my power to have fled for refuge there, when the allied powers took up arms against me, and unitedly compelled me to abdicate in favor of my son. The curses of the civilized world will forever rest upon the English nation for their inhuman conduct towards me since I have been on this dreary island. My son, I trust in God's name, will live to revenge my death. Saying this, he handed Knapp a beautiful gold snuff box, which he presented him as a token of the esteem he bore the American people, and desired him to deposit it in some public place in our country. This interview with Napoleon took place on the 3rd of May, 1824; the following day a dreadful tempest arose. A beautiful willow, which had been the Exile's favorite, and under which he had often enjoyed the fresh breeze, was torn up by the hurricane, and almost all the trees on the island shared the same fate. The memorable 5th of May came amid wind and rain. With the close of this day, the mortal existence of this extraordinary man was to end forever. Napoleon's passing spirit was deliriously engaged in a strife more terrible than that of the elements around. The words *tete d'armee*, the last which ever escaped his lips, intimated that his thoughts were watching the current of a heady fight. About six in the evening the spirit of the sainted Napoleon ascended to its God.

"On the morning of the 8th we left the island of St. Helena, and steered for the southern coast of Africa, a distance of about nineteen hundred miles.

"We therefore continued our voyage and in thirteen days reached our destination. Here we disposed of our cargo, consisting of hides and leather, and commenced reshipping our homeward cargo, which

To convict the prisoner it was necessary for the government to prove that Frank was present, actually or constructively, as an aider or abettor in the murder. Mr. Webster's task in the prosecution was to convince the jury first that there was a conspiracy to commit the murder and that the prisoner

took us little over a week. On the 17th of January, we left the port of Vautileague, for Havre, where, after a pleasant passage, we safely arrived. Having been detained here more than three weeks by contrary winds, we at length set sail; and in less than one month, found ourselves snugly moored in Salem harbor. During this disastrous voyage, we lost seven men and two cabin boys, all but one of whom were Americans, and born in the county of Essex. Captain Knapp had been on shore but a few days, before he was requested by the owners to again take command of the ship *Endicott*, which was to be ready for sea in a fortnight. He accepted the situation, and commenced shipping a new crew. I was retained as supercargo, and Dick Crowninshield appointed first mate. The crew consisted of thirteen in all, including cabin boys. We set sail early in June of 1827, for London, where we arrived in thirty-six days, having had a most delightful passage across the Atlantic.

"A few evenings after our arrival, Knapp and myself went to Drury Lane Theater, and saw young Kean play *Iago*, to his father's *Othello*. Miss Fanny Kimball was the *Desdemona* of the evening. The theater was crowded almost to suffocation, with the beauty and aristocracy of the capital of the old world. After the tragedy, some one in the galleries bellowed out play God save the King. Now, although Knapp and myself were perfectly willing God *should* save the King (George the Fourth) when the proper time arrived—he has since kicked the bucket, but whether God saved him or not may well be questioned—yet, as we did not wish to be disturbed by the ceremony just then, we accordingly called for 'Yankee Doodle' or 'Hail Columbia,' whichever best pleased the leader of the orchestra. Give us 'Yankee Doodle,' or no play, cried we, for we don't like the dull tune of God save the King. The greatest confusion reigned throughout the house for some time. 'Kick them Yankees out,' bellowed the dirty-faced John Bulls in the galleries. 'You can't do it,' quoth we, and thus the dialogue went on. At length the peace officers interceded, and quelled the disturbance, not, however, before five or six bull Englishmen that sat near us, and who had endeavored to jostle us out of our seats, had felt the power of our sledge hammers.

Some nights after this occurrence, Knapp went with Dick Crowninshield to the opera house to hear *Madam Malibra* sing. Having heard the King was to be present, they seated themselves in the pit immediately in front of the royal box. On the entrance of His Majesty, Frank, looking him full in the face, exclaimed, 'What a King; why, we have better-looking handcartmen in Salem than you

was one of the conspirators; and secondly that, at the time of the murder, he was in the street at the rear of Mr. White's garden to aid and abet in the murder, ready to afford assistance if necessary. The force of Mr. Webster's argument convinced the jury that he was, in this sense, *present* at the murder, and he was convicted and hanged.

are, my old boy.' This was too great an insult for the Englishmen present to bear, and Frank and Dick were accordingly put out of the theater without much ceremony. Thus much for London.

"Our cargo being all on board, and the necessary preparations made, we sailed about the middle of October for Salem, where we safely arrived after a boisterous passage of thirty-seven days. I believe more than twelve thousand dollars was made for the owners during this voyage.

"Frank Knapp now determined to quit the seas, until commerce once more assumed a brighter aspect. He accordingly declined the command of the *Endicott*, which had been offered him by the owners, and for a while, became a landsman.

"Of what took place on the night of the fatal 6th of April last, I shall say nothing. The journals of the day have for months been filled with the subject, and all minds have, long since, been made up as to his guilt or innocence. Knapp has twice put himself upon God and his country for trial, and twelve good men, representing his country, have decided against him. From this decision there is, and should be, no appeal. His doom, therefore, is irrevocably fixed. In a few days, him who was once an honor to his bereaved family, and connections, will have gone to a higher than an earthly tribunal, to answer for the deeds done in the body. Let me not be considered as his apologist. If Knapp was in any manner, either as principal or accessory, concerned in the murder of the late Captain White, then he richly merits death. Should there, however, remain one reasonable doubt as to his guilt, he is entitled to the benefit of that doubt, and ought not to perish ignominiously upon a scaffold. For myself, I believe that whatever part he took in this bloody business, was a fatal error of expediency—an error, or a crime of the head, and not of the heart. Compulsion when resorted to, often does wonders; may it not, in this case, have compelled Knapp, even against his better judgment, to take the part it is represented he did. Surely it is possible. Let then the ministers of the law look to it, ere it is too late.

"Here I drop the subject. Were even the united hosts of angels trumpet-tongued to appear and plead his innocence of the crime charged against him, it would avail nothing. Public vengeance cries for its victim, and it must be appeased. Let the unhappy Frank be comforted, however, by the reflection, that God is his final judge, and that when he shall appear at his bar, he will receive that full measure of justice which has been denied him on earth."

THE TRIAL.⁴

In the Supreme Judicial Court of Massachusetts, Salem, Massachusetts, July, 1830.

HON. ISAAC PARKER,⁵ *Chief Justice.*

HON. SAMUEL PUTNAM,⁶

HON. SAMUEL S. WILDE,⁷ } *Associate Justices.*

HON. MARCUS MORTON,⁸ }

July, 13.

The SUPREME COURT met here today by virtue of an Act of the Massachusetts Legislature passed June 5, 1830. The Act, while giving to the Court jurisdiction of all crimes and misdemeanors committed in the County of Essex before its

⁴ *Bibliography.* *"A Report of the Evidence and Points of Law arising in the Trial of John Francis Knapp, for the Murder of Joseph White, Esquire, before the Supreme Judicial Court of the Commonwealth of Massachusetts; together with the Charge of His Honor, Chief Justice Parker, to the Grand Jury, at the Opening of the Court. Salem: Published by W. & S. B. Ives. 1830."

*"Trial and Conviction of John Francis Knapp for the Murder of Joseph White, Esq., of Salem, on the Sixth of April, 1830. Boston: Published by Charles Ellms, corner of Court St. and Cornhill. 1830."

*"Trial of George Crowninshield, J. J. Knapp, Jun., and John Francis Knapp, for the Murder of Capt. Joseph White of Salem, on the night of the Sixth of April, 1830. Reported by John W. Whitman, Esq. Boston: Published by Beals & Homer and Francis Ingraham. 1830."

*"Appendix to the Report of the Trial of John Francis Knapp on an Indictment for Murder, containing the New Evidence, the Arguments of Counsel and the Charge of His Honor, Judge Putnam, to the Jury, on the Second Trial. Salem Edition. 1830."

"Appendix. Brief Sketch of the Proceedings of the Committee of Vigilance."

"Trial of John Francis Knapp, as Principal in the Second Degree for the Murder of Capt. Joseph White. Reported for the Publishers. Boston. Published by Dutton & Wentworth. 1830.

"Second Trial of John Francis Knapp for the Murder of Capt. Joseph White."

"Wild Achievements and Romantic Voyages of Captain John Francis White (one of the Salem Murderers) while Commander of the Ship, General Endicott, with an Account of his seeing the

passage, was intended, as stated by the Chief Justice in his charge to the Grand Jury "to make judicial inquiry into a transaction of a most affecting nature which took place in this town some months ago, a transaction to excite alarm and agitation not only in the vicinity where it happened but throughout the Commonwealth and even beyond it."

The customary prayer having been offered by the *Rev. Mr. Cleaveland* and the members of the *Grand Jury* being in their seats—

CHIEF JUSTICE PARKER. Gentlemen of the Jury: This court is convened out of its ordinary season in virtue of a special appointment of the legislature made at its last session, and you have been summoned here by the same authority, and having had the oath administered to you which is prescribed by law, to qualify you to act in the capacity of Grand Jurors, you now have become the grand inquest of the Commonwealth for the body of this County of Essex, with all the power and duties which pertain to that body when attending the ordinary session of this court in relation to such cases as come within the purview of the statute above referred to.

Celebrated Magellan Clouds and visit to Buonaparte at St. Helena. By his Supercargo. Boston. Published for the Author. 1830."

"Webster's Argument, Confession and Sentence. Trials of Captain Joseph J. Knapp and George Crowninshield, Esq., for the Murder of Captain Joseph White of Salem. Boston. Published by Charles Ellms. 1830." The frontispiece is a picture of Captain Knapp at a tea party at Captain White's on the night before the murder.

*"Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By Octavius Pickering, Counselor at Law. Vols. IX, X. Boston: Little, Brown & Company. 1864."

*"A Biographical Sketch of the Salem Murderer, who for the past ten years has been the terror of Essex County, Mass., including a full and authentic account of his daring exploits, together with many new and interesting particulars of the late murder. By a Citizen of Danvers. Boston: Printed for the Author. 1830."

The best collection of the books and pamphlets relating to these Trials is in the library of the Essex Institute at Salem.

⁵ See 1 Am. St. Tr., 108.

⁶ See 1 Am. St. Tr., 108.

⁷ See 4 Am. St. Tr., 99.

⁸ **MORTON, MARCUS** (1784-1864). Born Freetown, Mass. Clerk Mass. State Senate, 1811; member United States Congress, 1817-1821; member Executive Council Mass., 1823; Acting Governor, 1825; Judge Supreme Court, 1825-1840; Governor of Massachusetts, 1840-1843; Collector of Customs, Boston, 1845-1849; member State Legislature, 1858. Died in Taunton, Mass.

The jurisdiction given to the court by this act of the legislature extends to all crimes and misdemeanors which may have been committed within the body of this county, before the passing of this act; such as may have occurred since that time are to be left to the usual administration of justice at the succeeding regular term of the court. Notwithstanding the general terms, in which the jurisdiction of the court is given, comprehending all crimes and misdemeanors, there is reason to believe that the chief purpose of the legislature in establishing this term was, that judicial inquiry should be made into a transaction of a most afflictive nature, which took place in this town some months since. This transaction was of a nature to excite alarm and agitation, not only in the vicinity where it happened, but throughout the Commonwealth and even beyond it.

An aged and respectable citizen, living in the center of this populous town, so long remarkable for its tranquillity, peace and order—he being surrounded by all those circumstances which usually give security to the property and person—has been assassinated in his bed, probably in the depth of his sleep, his skull fractured by a blow from some heavy weapon, his body pierced with many wounds, and this was done with such secrecy, that not a trace for a long time appeared to be left by which the perpetrator of so horrid a deed could be discovered.

No wonder that the shock felt here was so great; it has vibrated through the community—murder is, under all circumstances, an appalling crime; it exhibits in the perpetrator the deepest stain of depravity of which human nature is capable; but when in the stillness of night, during the hour of repose, the assassin invades the quiet mansion, steals into the chamber of sleep, and changes that sleep into death, by one fell blow, and as if insatiate of blood, seeks the heart of the victim, which had already ceased to beat! There is no stoicism in philosophy and hardly any religion which can express those feelings of terror, those expressions of horror, which such a tragedy is calculated to produce. I speak thus of the crime, because it is notorious. We all feel alike about it, nor is there any occasion to suppress the feeling, but it must be regulated and kept within just bounds.

You are convened here not to inquire if a crime has been committed, though even that must be proved to you by legal evidence, so as to seek out the perpetrators, and present them, if discovered, to the bar of this court for trial. It is the duty of the Court to warn you against suffering your indignation for the crime to affect your inquiry for the offenders. The popular voice justly cries out for vengeance, but it is only upon the guilty it ought to fall.

There is danger in all great excitements, that the mind may be thrown off its balance, that the process of inquiry may be too rapid to be sure, that the suspected may readily be believed to be guilty; that prepossession may supercede proof. How apt are we all upon hearing of the commission of some great crime, to listen greedily to every circumstance which has a tendency to fix the guilt upon some individual; to shut our ears against exculpatory facts, and to

pass sentence of condemnation before any hearing and without any trial.

This is a state of mind which disables us from acting impartially in the office of judge or juror. We are to stand indifferent between the Commonwealth and the party accused, even to presume that he is innocent until we have proof that he is not. We are to sift and weigh all the facts produced in proof, with a hope that they may all be consistent with his innocence.

A Grand Jury, especially, who by the very nature of their duty, are prevented from hearing the accused, or any evidence in his favor, except what may be drawn from the witnesses produced against him, should be cautious not to proceed hastily or upon slight evidence. They ought to be satisfied before they agree upon a presentment, that the evidence, as it appears before them, is sufficient to convict him of the imputed crime. For if it should not be sufficient under these circumstances, what probability is there of a conviction when the party shall be put upon his full defense, with the privilege of adducing counter evidence in his favor, and of counsel to enforce it. And no citizen ought to be exposed to the anxiety and ignominy of accusation for a capital offense, if there be no probable proof of his guilt.

It is a most happy characteristic of our system of criminal justice, that it requires deliberation and patient investigation. Let those who complain of the slowness of its pace, consider, that it is framed for the protection of innocence, as well as for the punishment of guilt; and that more rapid movements might involve in ruin those who might afterwards be found not to have deserved it. Occasions like the present sometimes arise when a just indignation at some enormous crime pervades the whole community; and the officers of justice are loudly called upon by the public voice to hasten the exercise of their functions, and to purify the land of the blood with which it has been stained, by an early condemnation of the supposed perpetrator; but the law moves not from its course—it gives time for deliberation—for the return of sober thought, which has been suspended by agitation and excitement—it calls for proofs—it gives reasonable opportunity for defense—it proceeds warily and cautiously—and decides only when it may be presumed there is little room to doubt the rectitude of its decisions, and this is all which can be attained by human tribunals, for fallibility is stamped upon everything human.

Under the guidance, however, of a wise Providence, and with a due observance of legal formalities and rules, we may trust ourselves even with the lives of our fellow beings; for the law has committed them to our charge, and if we severally discharge our duty with honest hearts and with the use of all the light bestowed upon us, we shall stand approved to our own consciences and to the great and just Judge whose ministers and servants we are.

There is more than common cause for recommending the exertion of your powers to throw off all preconceived opinions, and to bring your faculties to the examination of the evidence which will be submitted to you, with entire self-collection and impartiality. The ex-

traordinary character of the crime has seized upon all imaginations and preoccupied many judgments. An unusual publicity has been given to such discoveries and disclosures as have, from time to time, been made.

The self-execution of one who has been supposed the immediate agent of the cruel deed, has given additional force to opinions before, perhaps, strongly conceived.

Gentlemen! it is on such great occasions that supreme wisdom is called for—in the ordinary course of crime, the machinery of justice will move steadily and regularly with its only customary superintendence; but when great and astonishing events occur, which call for judicial investigation—when the public mind is agitated and disturbed and the popular voice is audible, crying for vengeance—it is then, that those who are clothed with the robes of magistracy, or who otherwise become functionaries of the law, are to divest themselves of human passions, to elevate themselves above the dense atmosphere which surrounds them, and imitate in their humble measure, the wisdom and impartiality of the God of Justice!

Gentlemen! we cannot but regret the unusual publicity that has been given to the facts and circumstances which have transpired on this mournful subject. We shall see, I fear, that it will have had a tendency to impede the course of inquiry—but, we trust, you who represent the country in the first stage of this solemn proceeding, will assume the attitude of impartial judges of the evidence—that you will diligently inquire, and true presentment make—that you will be influenced neither by prejudice nor favor—that you will present things truly, as they come to your knowledge, according to the best of your abilities and understanding.

It is not necessary, upon the present occasion, to discuss the various classes of homicide, in order to distinguish between that which is justifiable, as in self-defense—that which is the effect of sudden provocation, which may be manslaughter—and that which is the effect of malice aforethought, which is murder. If it shall turn out in evidence, that the house of the deceased was entered in the night time—that he was slaughtered in his bed—whether the object of the perpetrator was plunder, revenge, or the hopes of reward from others who may have incited the deed, it is murder of deepest dye in regard to those who may have given the death wound, and any who may have been present, aiding and abetting the crime.

Such is the common law, and such is the province of the statute of this Commonwealth, which enacts “that if any person shall commit the crime of wilful murder, or shall be present, aiding or abetting in the commission of such crime, not being present, shall have been accessory thereto before the fact, by counseling, hiring, or otherwise procuring the same to be done, every such offender, who in the Supreme Judicial Court shall be duly convicted of either of the premises and offenses aforesaid, shall suffer the punishment of death.”

It may be a subject of inquiry, what constitutes presence within the meaning of the second branch of this enactment, “present, aiding and abetting in the commission of such crime.”

And the construction of this phrase, which is taken from the common law, has been settled in ancient times by wise and learned sages of the law, and that construction adopted and sanctioned by successive judicial decisions down to the time of the adoption of our Constitution, so that the legislature which enacted this statute, without doubt referred to this construction when they framed it.

By this construction it is not required that the abettor shall be actually upon the spot when the murder is committed, or even in sight of the more immediate perpetrator, or of the victim, to make him a principal.

If he be at a distance, co-operating in the act by watching to prevent relief, or to give an alarm, or to assist his confederate in escape, having knowledge of the purpose and object of the assassin—this in the eye of the law is being present, aiding and abetting, so as to make him a principal in the murder.

The distinction between a person thus situated and one who is denominated by the statute an accessory before the fact is, that the latter is not only in every sense absent from the scene of the crime, but is not an immediate participator in it; he may not know the time when and the place where it is committed. He has previously, perhaps days or months before, hired counseled or procured the deed to be done, but he has no immediate agency in the deed.

His crime is deemed by the law to be as great as his who strikes the blow; it is often in a moral point of view greater, as it may combine a greater number of desperate and diabolical motives, without the influence of which the crime would never have been committed. It denotes the savage heart of the murderer, without his bold and daring hand. It puts in peril his own soul, and the souls of others, who but for him might have gone free from the guilt of blood. Thus the law punishes the accessory before the fact in the same manner as it punishes the actual perpetrator—they are alike murderers.

There is at the common law a difference, and it is supposed to exist also under one statute, in regard to the form and the time of trial, between those who are called principals, and accessories before the fact, it being held that unless there be a conviction of a principal there can be no trial of the accessory. This difference, if it exist, is a relic of the unwise refinement of ancient times, there being no good reason why an accessory before the fact to a crime proved to have been committed, should not be tried and punished, although the principal may have escaped, by death or otherwise, the punishment which awaited his crime in this world.

But if occasion should arise to examine this point, and the common law would not be found to have been varied by our statute, the legislature will probably afford a remedy for future cases.

I have thus, gentlemen, I believe, discharged all the duties of the Court, in this stage of its proceedings, in regard to the principal subject which will require your attention.

If before the passing of the act under which we assemble, other

offenses cognizable in this Court shall have been committed, and not have yet been before a Grand Jury, you are authorized, but not required by the statute, to inquire into and present them.

In regard to such cases, as well as to any questions of law which may arise upon the subject on which I have given you the charge, you will have the advice and assistance of able and experienced officers of the Government, whose duty it is to facilitate your investigations, and to reduce the result to such form of presentment as the nature of each may require.

Gentlemen your duty and ours may be arduous and embarrassing; that it may be discharged with clear understanding and firm hearts, let us look to the dispenser of all light and wisdom for His blessing upon our endeavors.

Mr. Dexter. Before the grand jury go out, I would respectfully move, that they be instructed as to what evidence they should receive. This was done in a celebrated case—that of Aaron Burr.

The CHIEF JUSTICE. That case is remarkable for that, and another circumstance, not known to our law, that is, the challenge of grand jurors. With us the Court never instruct the grand jury upon the nature of the evidence to be heard before them. There will be a revision of their doings and it is unnecessary to go into the inquiry beforehand.

The *Solicitor General*. It is a sufficient answer to the suggestion of the gentleman, that in the case alluded to, Chief Justice Marshall said that “it was usual and the best course for the Court to charge the jury generally, and to give their opinion on incidental points as they arose when the grand jury themselves should apply to them for information.”

Mr. Dexter. It is true that the remark was made by Chief Justice Marshall, but he did send special instructions to the grand jury before the question arose. He did direct that “no affidavits nor papers, containing distinct substantive testimony against the accused should be sent to the Grand Jury.”

The CHIEF JUSTICE. It would be a very inconvenient practice. The law reposes confidence in the officers of the government; they are not supposed to procure an indictment against a man upon improper evidence.

It is the opinion of the Court that they cannot go out of the usual course. They think it would be a good rule for the officers of the government to adopt, to offer no evidence to the grand jury, which they would not be willing to offer in Court.

Mr. Dexter. Before the jury retire, I wish to inquire if the English practice does not prevail here, to indorse the names of the witnesses examined before the grand jury upon the indictment.

The *Solicitor General*. We have a better practice, and that is, to return the names of the witnesses examined before the grand jury, and that makes a part of the record of the case.

July 16.

The *Chief Justice* remarked that there seemed to be an intention of publishing in the newspapers, the proceedings of the Court from day to day. Such publications must necessarily be imperfect, and perhaps mischievous. The Court is, therefore, decidedly of opinion that the proceedings ought not to be thus published, as they would give only imperfect information. What passes one day may be essentially altered or modified by the doings of a subsequent day. There may be no objection to publishing the state of the case as it advances; but there must be no publication of the evidence before the trials are concluded.

The *Grand Jury* came into court with the bill which they had found.

The indictment charged, that on the 6th of April last, J. Francis Knapp committed the murder, by giving the deceased a mortal blow on the head with a bludgeon, and that on the 2nd of April, Joseph J. Knapp and G. Crowninshield, hired and procured the felony to be done:—

Also, that J. Francis Knapp gave the deceased several mortal wounds in the side, with a dirk, and that Joseph J. Knapp and G. Crowninshield hired and procured it to be done:—

Also, that Richard Crowninshield, Jr., gave the mortal blow with a bludgeon, and that J. Francis Knapp was present, aiding and abetting; that Richard Crowninshield, Jr., on the 15th of June, committed suicide, so that he cannot now be proceeded against, and that J. J. Knapp and G. Crowninshield hired and procured R. Crowninshield, Jr., and J. F. Knapp to commit the felony:—

Also, that R. Crowninshield, Jr., gave several mortal wounds with a dirk, and that J. F. Knapp was present, aiding and abetting; that R. Crowninshield committed suicide, etc.; and Joseph J. Knapp and G. Crowninshield hired and procured, etc.—

Also, that a person to the jurors unknown gave a mortal wound with a bludgeon, and that J. F. Knapp was present, aiding and abetting; and that Joseph J. Knapp and G.

Crowninshield hired and procured such persons unknown, and J. F. Knapp to commit the felony:—

Also, that a person to the jurors unknown gave several mortal wounds with a dirk, and that J. F. Knapp, was present, aiding and abetting, and that Joseph J. Knapp and G. Crowninshield hired and procured, etc.

At the request of the prisoner, *Franklin Dexter* and *W. H. Gardiner* were assigned as counsel for the Knapps, and *Samuel Hoar*⁹ and *Ebenezer Shillaber*¹⁰ for Crowninshield.

July 26.

*Mr. Leverett Saltonstall*¹¹ announced to the Court the sudden death on the night of Sunday, July 25, of CHIEF JUSTICE PARKER, and read to the Court the resolutions adopted by the Essex Bar on this morning.

JUDGE PUTNAM (Senior Justice). The surviving members of the Court reciprocate, with deep sensibility, the affectionate address of the members of the Bar—alike honorable to them and respectful to the memory of our deplored Chief. The community may imagine, but we know and feel the loss which words cannot express. He was taken away in the midst of his intellectual strength and judicial labors. But a few hours have passed since he commenced the immensely important business which has called us together, with a charge to the Grand Jury, clear and impartial as was his

⁹ HOAR, SAMUEL (1788-1856). Born Lincoln, Mass. Graduated Harvard, A. B., 1802; A. M., 1805. Tutor in Virginia family, 1802-04; practiced law in Concord, 1805-45; delegate to State Constitutional Convention, 1820; State Senator, 1825-1833; Whig representative in 24th Congress, 1835-37. In 1844 was sent by Mass. Legislature to South Carolina to test the constitutionality of the laws authorizing the imprisonment of free colored persons entering that State. Was expelled from Charleston shortly after his arrival and on the same day by resolution of the legislature was expelled from the State. LL. D. Harvard, 1838. Member of American Bible Society, of American Academy of Arts and Sciences, and of Mass. Historical Society. Died in Concord.

¹⁰ SHILLABER, EBENEZER (1797-1856). Born Salem, Mass. Graduated Bowdoin, 1816. Ranked high in scholarship. Admitted to Essex bar, 1819. Began practice in Newburyport. Member of legislature. Removed to Salem and practiced there until 1841, when appointed clerk of the courts for Essex County. Held this office for ten years. Noted for thoroughness of research and closeness of logic. Died Biddeford, Me. See: *New England Historical and Geneal. Reg.*; Davis, Wm. T., *Bench & Bar of Mass.*; Cleveland, Nehemiah, *Hist. of Bowdoin College*, 1806-1879.

¹¹ See 6 Am. St. Tr., 599.

great mind. We trusted that he would have led and guided this momentous business to a just result. But Almighty God, in His inscrutable Providence, hath otherwise decreed. Let us pause—to gather up our depressed spirits—implore the Divine assistance in the performance of the duties which may devolve upon us.

The Resolutions of the Bar were ordered to be entered on the records of the court.

JUDGE PUTNAM announced that the trial would be adjourned until August 3.

August 3.

The prisoners, *John Francis Knapp*, *George Crowninshield*, and *Joseph Jenkins Knapp, Junior*, were placed at the bar and the indictment was read by the Clerk.

John F. Knapp pleaded *not guilty*.

Mr. Dexter said that the other prisoners being indicted only as accessories, were not obliged to plead before the conviction of a principal.

The COURT said they need not plead now.

The *Solicitor General* informed the Court that they had employed the Hon. Daniel Webster to assist in the more arduous part of closing the present cause of so much magnitude.

The COURT replied in terms of approbation for their zeal in the cause of the rights of the Commonwealth and expressed its pleasure at the event.

Mr. Dexter. I would state to the Court, that the prisoners are very desirous that *Mr. Rantoul*¹² should be appointed their counsel. *Mr. Rantoul* is not a member of this Court, but as it is the desire of the prisoners, perhaps the Court will not object.

The COURT. It is not usual, and I think it improper for the Court to assign counsel not members of this Court, and who are consequently not acquainted with its rules; the prisoners will have all the benefit of *Mr. Rantoul's* counsel and assistance.

Perez Morton,¹³ Attorney General;

Daniel Davis,¹⁴ Solicitor General; and

¹² RANTOUL, ROBERT. (1778-1858.) Born Salem, Mass. A leading reformer of that State; first a druggist at Beverly and a member of the State Legislature, 1809-1820; of the State Senate, 1821-1823, and of the State Constitutional Conventions of 1820 and 1853. He took part in the Militia and Coast Guard service in the War of 1812 and later became a member of the Massachusetts Peace Society. He founded at Beverly the first Sunday School in America. Died in Beverly, Mass.

¹³ See 1 Am. St. Tr., 109.

¹⁴ See 2 Am. St. Tr., 551.

Daniel Webster,¹⁵ for the Commonwealth.

*Franklin Dexter*¹⁶ and *William H. Gardiner*¹⁷ for the Prisoner.

Joseph J. Knapp and *George Crowninshield* were remanded for further proceedings.

Mr. Gardiner. Application was made by prisoner's counsel to have a list of the witnesses examined before the Grand Jury, endorsed upon the indictment, according to the English practice. It was answered by the Solicitor General, that it was our practice to return a list of the witnesses to the clerk's office; and he was understood to say that such a list would be returned, that the Counsel might know who were to be witnesses in each case. Such a list has not been furnished. I have a letter addressed to the Attorney and Solicitor General.

Mr. Webster objected to the reading of the letter.

The COURT inquired what was the object of reading the letter.

Mr. Gardiner. We wish even at this late hour to be furnished with a list of the witnesses on the part of the Commonwealth. The prisoner has a right to know what witnesses are to be called against him. He may be obliged to send to a great distance for counter testimony, or to procure copies of records.

The Attorney General. The law does not require a list to be furnished, except in treason. What we stated was, that we filed the names of all the witnesses in all the cases.

PUTNAM, J. The Court did not so understand it. We understood that the Solicitor General promised a list of witnesses for

¹⁵ WEBSTER, DANIEL (1792-1852). Born Salisbury, N. H. Graduated Dartmouth, 1801. Studied law and admitted to Boston bar, 1805; began practice in Portsmouth, N. H., and in 1813 was sent to Congress from New Hampshire. Removed to Boston in 1816 and soon became a leader of the Bar of New England. Member of Congress from Massachusetts, 1823-1827. United States Senator, 1827, until his death, except while Secretary of State in President Tyler's Cabinet. One of the greatest of American orators. Died in Mansfield, Mass.

¹⁶ DEXTER, FRANKLIN (1793-1857). Born Charlestown, Mass. Father Secretary of Treasury under John Adams. Graduated Harvard, 1812. Admitted to bar, 1815. State representative Mass. Legislature, 1825, 1826, 1840. State senator, 1835. Member of Select Committee on Revised Statutes, 1836. United States District Attorney, 1841-45, 1849. LL. D. Harvard, 1857. Died in Beverly, Mass.

¹⁷ GARDINER, WILLIAM HOWARD. Born Boston. Graduated Harvard, 1816. Studied law at Harvard; admitted to Suffolk bar, 1819. Delivered oration before Phi Beta Kappa (Harvard), 1834. Able and distinguished lawyer. Died in 1882. See Davis, Wm. T., Bench & Bar of Mass.

each case separately. It is reasonable that the prisoner should be furnished with such a list. We think it his right.

The *Jury* was then impanelled, and after nineteen challenges peremptorily, and eleven for cause, the following were sworn:

Solomon Nelson, Ephriam Annable, John Ayre 3d, Joseph Bartlett, Nathaniel Brown, Samuel Foster, Charles Foster, William Micklefield, Ichabod B. Sargent, Joshua Howard, John Morrill, Asa Todd. Mr. Nelson was appointed Foreman by the Court.

In impanelling the jury, a juror was asked by the *prisoner's counsel* whether he had formed or expressed an opinion as to the guilt of the prisoner, or was sensible of any bias or prejudice against him; and upon his answering in the negative, the prisoner challenged him.

Mr. Webster objected that after such an answer it was too late to challenge.

The *Court*. We are strongly of opinion that the prisoner has a right to challenge under such circumstances. A juror may answer in such manner as to place himself above any legal exception, and yet excite distrust in the mind of the prisoner. The challenge will be peremptory.

Another juror, being questioned, said he did not know whether he had expressed an opinion or not; that from what he had read in the newspapers, he had received an impression unfavorable to the prisoner, but that he had no fixed and definite opinion on the subject; he should be governed by the evidence.

Mr. Dexter objected to the juror for cause.

The *Court* then asked the juror if, in his opinion, he had made up his mind so that he could not give the case an impartial hearing.

The *Juror* replied, "that he must say that his prejudices were against the prisoner."

The challenge for cause was thereupon allowed.

Another juror, having stated that he had formed an opinion in the case from what he had heard, was asked by the *Solicitor General* whether he had formed such an opinion as incapacitated him from giving an impartial verdict; he replied that he did not know how much he might be influenced by his preconceived opinion; he was challenged for cause by the *Solicitor General*.

Another juror, who was noted by the *clerk* to have been sworn in chief, stated, when the panel was called over, that he had been sworn only upon the *voir dire*.

Mr. Dexter contended that the minute of the clerk was conclusive.

The *Court* said if the juror was under the impression that he had been sworn only to answer questions, he ought to be resworn in chief.

Mr. Dexter requested that the witnesses in the present case might be directed to withdraw. The *Court* made an order to this effect.

August 13.

THE ATTORNEY GENERAL'S OPENING SPEECH.

Mr. Morton. Gentlemen: Since the adjournment of the court, the counsel for the Government have procured the services of a gentleman pre-eminent at the bar, to assist in the management of this cause, and at my request, from his superior physical strength, as well as for his acknowledged supremacy in the powers of mind, he has taken the more arduous duty of closing the cause, leaving to me the easier one of opening it.

All who are to take a part on this interesting occasion, have a painful duty to perform. To see a young man, in the vigor of his days, brought to the bar of his country, to answer for a crime that implicates his life, however guilty he may appear, will necessarily create feelings of regret, if not of compassion in every beholder of the spectacle. But we ought not to forget, that a faithful discharge of our respective duties is paramount to every other consideration. Public justice, as well as public safety, requires it at our hands; and so far as my duty requires, I will endeavor to discharge it with fidelity, and so far as yours extends, I feel confident that it will be discharged with candor, firmness, and impartiality.

The charge against the prisoner at the bar, is for the murder of the late Mr. Joseph White—a murder of no ordinary character—a murder the most cold-blooded, unprovoked, and atrocious that has ever yet stained the annals of our Commonwealth, if not of any other country—a murder in the commission of which every personal security and safety which the law specially guaranties to the citizen in the asylum of his dwelling-house, and in the recess of his bed-chamber, has been outraged and violated.

It is not to be wondered at that such a crime should have produced an uncommon excitement among the citizens of the place by its atrocity, for who of them could have felt himself safe in retiring to his rest, unless the authors of this abominable murder were detected and punished. And it affords

me satisfaction to say, that much credit is due to the Committee of Vigilance, chosen on the occasion, for their unwearied exertions to obtain that end. There is, however, one cause of blame which attaches to their laudable efforts, and that is their having suffered to be made public so much of the results of their inquiries; for nothing can be more improper and injurious to the cause of public justice, than editorial remarks on the relation of facts upon untried crimes: but it may be some apology for the Committee that the public mind had become so anxious and so full of inquietude, that it was nearly impossible to withhold most of the various facts, which their investigation had furnished; and we all know the avidity with which editorial paragraphists wish to anticipate public information, upon every interesting occasion.

The perpetrators of this atrocious murder remained, for a long time, veiled in darkness and mystery, notwithstanding the efforts to detect them. The circumstances under which it appeared to have been committed were such as naturally created suspicions against the inmates of the family; for it was found that nothing had been taken away, that no actual violence had been committed in entering the house, that the iron bar, with which the window where the assassin entered was usually fastened, was taken down and carefully placed against the side of the window. I say, these circumstances occasioned a necessary inference to be drawn, that some one, familiarly acquainted with the interior of the house, was either the murderer, or an abettor or accessory to him.

The first suspicion fell upon the son of Mrs. Beckford, who was the niece and housekeeper of the deceased; but on inquiry it was found that he could have no concern in it, not having been in a situation to render it possible.

The breath of scandal spread, no doubt, as since appears to have been his intention, by the prime instigator of the murder, to cover his own atrocity, imputed this deed of death to the favorite nephew and principal heir of the deceased, Mr. White; but the filial and parental-like affection which was known to subsist between this uncle and nephew, the acts of kindness and beneficence of the former, and the grateful attachment

of the latter, and, with those who knew the man, the honor and integrity of his mind and heart, so often evinced by the voluntary suffrages of his fellow citizens of the county, soon dissipated this ephemeral slander, leaving, however, on his honorable mind an embittered regret, that any one, for a moment, could suppose him capable of so dark and horrid a crime.

Still, gentlemen, the perpetrators of this heinous offense continued wrapped in secrecy, for although he who did the deed was heretofore indicted for the murder, yet that indictment was found upon circumstantial evidence, and the testimony of a convict from the State Prison, as to those circumstances. But not a conjecture was whispered, that I ever heard, against the real authors of the murder, until a letter was handed to the Committee, under the signature of one Grant, but really written by Palmer, whom you will have as a witness upon the stand, dated at Belfast, May 12th, post-marked May 13th, directed to J. J. Knapp, not having the addition of Junior to it; and, by that means, it was handed to the Committee by the father, for whom it was not intended. We are not now about to give any account of the contents of this letter, but only to say, that in consequence of it, and by some address of management by the Committee, Palmer was arrested at Belfast, as having some concern in the murder, or as having knowledge of the persons who were the perpetrators, and the two Knapps were arrested, charged with being deeply implicated in the fact.

Suffer me here, gentlemen, to pause, and make a moral reflection. This letter of Palmer, and the manner of its falling into the hands of the Committee, I consider as one of those mysterious ways of divine Providence, which lead to the detection of secret murderers; and it may be remarked, as a general truth, that it seems to be the will of Heaven, conformably to its own law, "whoso sheddeth man's blood, by man shall his blood be shed," that the secret murderer should not escape detection, and punishment even from a human tribunal, whatever may be his retribution in the world to come. And not unapt is the language of the great delineator of the

human passions, used on a similar occasion, put into the mouth of his Hamlet, whose father had been secretly murdered, and who was, by an ingenious device, endeavoring to detect the murderers, when he says, "Murder, though it have no tongue, will speak with most miraculous organ"—and in that case it did speak, through the stings and goads of conscience of the queen, his mother.

Gentlemen, a few words more, by way of preliminary, and before I introduce the evidence, as it respects my own conduct in this case, in my official capacity.

After the two Knapps were arrested, at the request of several respectable citizens of Salem, I authorized in writing the Rev. Mr. Colman to receive the free and voluntary disclosures of any one of the individuals charged, without naming any one; and giving him authority to say that on condition of his disclosing the whole truth and nothing but the truth respecting the murder, I would call him as a witness on the trial, and that, being a witness, he would have the implied pledge of the Government, not to be prosecuted for that offense. In consequence of this authority, Mr. Colman received the voluntary disclosure of J. J. Knapp, Jr., in writing. Accordingly, to redeem the pledge on the part of the Government, I have called him before the Grand Jury, at this term, as a witness, to give evidence as he has disclosed. But, by the advice of his counsel, he refused to testify there, saying he was not bound to criminate himself; but as the inquiry before the Grand Jury may not be considered as calling him as a witness upon the trial, I shall, in the course of the examination of the evidence, again call him as a witness, and if he again refuses to testify, every one will acknowledge that the pledge of the Government will be completely redeemed, and his promised protection will be forfeited, and he must stand on his own original responsibility.

The Counsel for the Government do not confidently expect that the evidence which will be given you, will justify the belief that the prisoner at the bar actually gave the blow on the head, or the stabs in the heart of the deceased, for he, who, it will appear, did the deed, wretched man, like his great

prototype, who betrayed the Saviour of the world for thirty pieces of silver, smitten with the stings of conscience, has gone and hanged himself; though less scrupulous than Judas, he has never returned the wages of his iniquity.

It is, however, altogether immaterial, whether the prisoner at the bar, actually gave the mortal blows, provided he was present, aiding and abetting the person who inflicted them. He is charged both ways. And this naturally brings us to the consideration of the law of Abetments.¹⁸

By the very ancient common law, before the reign of Henry IV, of England, he alone who gave the stroke was considered as the principal offender, and those who stood by in aid and assistance of him who actually committed the felony were held to be only accessories; and these aiders and abettors at the time of the felony had the same right that accessories before the fact now have—that of not being tried till he that struck the blow should be tried and convicted; so that if he who actually committed the murder died before he was tried and convicted, those who were present, aiding and assisting, could never be tried, and, of course, escaped punishment. But this principle was found to be so repugnant to the common understanding of mankind, that in the time of Henry IV, all the judges of both benches concurred in altering that principle of the ancient common law, and settled it more conformably to reason and morality, common sense and public justice, by making the abettor at the fact a principal.

Had these judges advanced one step further towards common sense, and decided that when he that gave the blow and he that abetted him had died, or was otherwise not capable of being tried and convicted, the accessory before the fact (the felony or murder being proved), should be amenable to justice, as for a substantial offense, they would have left their common law much more perfect on this subject than it now is; for in moral turpitude the guilt of him who hires the assassin to

¹⁸ *Mr. Morton* explained the law to the jury in nearly the same way as did the Solicitor General in his opening speech in the second trial. See *post*, p. 423.

do the deed, and absents himself, is of a darker grade, in my apprehension, than his who has the courage to do it.

The celebrated Mr. Peel, in the bill which he brought before the House of Commons, contemplating amendments or alterations of some of the rules of common law, makes this very case one of the amendments, and constitutes the offense of an accessory before the fact in felony a substantive crime, and triable independently of the principal, under certain conditions.

And now, gentlemen, let us hearken to the testimony; and the Government are first bound to prove the *corpus delicti*, that is, that the deceased Mr. White came to his death by the hand of external violence.

Having proved the death by the hand of external violence, we shall then proceed to prove to you that the death was effected by a wicked conspiracy and combination of individuals, of which the prisoner at the bar was one, to destroy the life of the deceased, and to this point we shall offer Joseph Jenkins Knapp, Jr., to redeem the pledge of the Government given for his protection, on condition of his testifying the whole truth and nothing but the truth on this trial. If he refuses to testify, gentlemen, every one must be satisfied that the pledge of the Government, given for his protection, is fully redeemed; and that he has now forfeited that proffered protection, and stands accused as an accessory before the fact to this murder. He has an unquestionable right to take the stand he has, for the Constitution of the Commonwealth provides that no subject shall be compelled to accuse, or furnish evidence, against himself.

If we cannot prove this vile conspiracy and combination to murder the deceased by the disclosure of this accomplice in the crime, by the blessing of God we will prove it by other testimony in the case.

And if, in the opinion of the Court, we shall be able to show that such a conspiracy existed, another principle of law will be relied on, that when a conspiracy to do an unlawful act is proved, the acts of any one of the conspirators, done in

effecting the object of their combination, may be given in evidence against any other of the conspirators.

August 13.

The trial lasted ten days, the closing speeches being made by *Mr. Webster* for the Commonwealth, and *Mr. Dexter* for the prisoner. JUDGE PUTNAM charged the jury.

The *jury* came into court today after deliberating twenty-four hours, and the *Foreman* said that the difficulty was about the presence of Knapp, and the purpose of that presence, in Brown street. The COURT said that those were matters of fact and evidence belonging to the jury, and the *jury* were again instructed, that if the defendant was in Brown street at the time of the murder, according to a previous agreement, performing his part in aiding and abetting, he would be implicated and liable under this indictment, as much as if he had been in the chamber of Capt. White. If the jury were satisfied that he was there, not for the purpose of aiding and encouraging, but only for the purpose of receiving information that the deed was accomplished, or from curiosity, then the law said he was not present.

The *jury* then went out and, after several hours, came in, when the *Foreman* stated that there was not the least probability of their ever coming to an agreement.

The COURT took the papers from the jury, and directed them to be discharged.

The *Solicitor General* moved to impanel a new jury and proceed to try the case again. *Mr. Dexter* objected, and moved a postponement to the regular term of the court, giving as a reason that an important witness was absent at sea, who would return prior to that time. This motion was overruled, and the trial ordered to proceed next morning.

August 14.

The former jury having been unable to agree upon a verdict, *John Francis Knapp* was again placed at the bar for trial upon the same indictment. The following jury were impanelled and sworn: Samuel N. Baker of Ipswich, Foreman; Orlando Abbot of Andover, Timothy Appleton of Ipswich,

Stephen Bailey of Amesbury, Jacob Brown of Hamilton, William D. S. Chase of Newbury, Stephen Caldwell of Newburyport, Phineas Elliot of Haverhill, John Ladd of Haverhill, Thomas Merrill of Topsfield, Amos Shelden of Beverly, Moses Towne of Andover.

The same Counsel were assigned the Prisoner.

Perez Morton, Attorney General; *Daniel Davis*, Solicitor General, and *Daniel Webster*, for the Commonwealth.

THE SOLICITOR GENERAL'S OPENING.

Mr. Davis commenced by explaining several counts in the indictment. He referred to the painful and distressing duty he had to perform in the share assigned him in the management of the cause. As to the important and responsible duty of the jury, he encouraged them to advance to that duty with fortitude and impartiality, as a reason for which he assured them that they would derive all necessary advice and direction from the Court.

He adverted to the excitement which the horrid nature of the crime, and the circumstances with which the commission of it was attended, had created. He would disown any country where the same cause did not produce a similar effect. He portrayed in vivid colors the unheard of and diabolical motives by which the perpetrators of it were prompted; and justified and vindicated all the measures which had been pursued by the Government and the citizens of Salem, to detect the assassins of the deceased, and to bring them to condign punishment; and reprobated in strong language the reproaches that had been cast upon them by the friends of the prisoner, and his accomplices; and compared their attempts to suppress all inquiry, and all efforts to prevent the detection of the murderers, and the infamous slanders upon some of the first men in the county, who had embarked in the associations to expose and punish the authors of this unheard of and diabolical combination, as of a grade of malignity and atrocity little short of the murder itself.

The *Solicitor General* defined and explained the nature of the crime of murder; that it was the greatest offense that can be committed against the law of nature—that it was punished with death by all laws human and divine—that death was the only adequate punishment for the crime—that its aggravations were two-fold; it set at defiance the laws of nature, of society and of God; and that the injury and sacrifice to the innocent victim, exceed all that the imagination can paint or describe—it sent him into the presence of his Maker without the notice of an instant; with all his imperfections on his head; without the privilege of uttering a single prayer for mercy from that throne whence we must receive it, or perish. The *Solicitor General* here adverted to the impious doubts and sentiments of those who denied the power of human governments to inflict capital punishments for any crime whatever, however malignant or atrocious; and pronounced their opinions upon this subject to be nothing less than setting up their wisdom in opposition to the wisdom of the all-wise and all-powerful Lawgiver and Judge of the Universe—and nothing less than a direct disobedience of that sacred and divine law which declares “that ye shall take no satisfaction for the life of a murderer who is guilty of death, but he shall surely be put to death, for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it.”

The *Solicitor General* then stated the facts which he expected to prove in support of the prosecution, which were—That a conspiracy, instigated by the most paltry, as well as the most diabolical motives, was formed to assassinate the deceased—That the conspiracy originated with Joseph J. Knapp, Jr., as long ago as the month of February last—That it was first proposed by him to his brother, the present prisoner—That he avowed the object to be, to destroy the will of the deceased, by which the bulk of his property would pass to relations other than the mother of his wife, who was a niece to the deceased. This wretch then proceeded to declare that he would give \$1,000.00 to any person who would commit the murder. The present prisoner immediately and without hesi-

tation or compunction assented to this infernal proposition; joined the conspiracy, and afterwards became one of the most active agents in carrying it into execution. The two Crowninshields were immediately applied to, and they joined in the conspiracy. The act of inflicting the fatal blow was assigned to Richard Crowninshield, and by him inflicted, and the price of blood was paid to him. The present prisoner accompanied him, and became a principal with him in the perpetration of this horrid deed. The plan of operation was matured on the 2nd of April preceding the murder, which was perpetrated on the evening of the 6th of April, under circumstances so appalling, as to defy adequate description. This is the outline of the case preceding the evening of the 6th of April, the time when the murder was committed:—the particulars of all which will be detailed by the witnesses for the Government.

As before stated, the arrangements were completed on Friday, the 2nd of April. The most important facts that will be proved are the following:—That on that evening, Joseph J. Knapp, Jr., Richard Crowninshield, and the present prisoner, met on the common in Salem; that Richard Crowninshield then exhibited to Joseph Knapp the weapons he had prepared for the execution of his murderous purpose; they consisted of a dirk and a bludgeon, the latter of which he then stated he had made with his own hand. It had been previously arranged that Joseph Knapp should unbar and unscrew the window in a back apartment in the house, which he had means of doing, from his connection with the family, without obstruction or suspicion; that this preparation was accordingly completed, the facts and circumstances concerning which will be clearly stated by the Government's witnesses.

It will further be proved to you, gentlemen, that about 10 o'clock on the evening of the 6th of April, Richard Crowninshield and the present prisoner met in Brown street; that they remained together a short time, with a full and perfect understanding and knowledge on the part of the present prisoner that Richard Crowninshield was to proceed immediately

to the house of the deceased and commit the murder; that Frank Knapp, the present prisoner, engaged to, and did remain in Brown street, during the time the murder was committed, with a full knowledge and consent on his part, of the intention of Richard to commit the murder; that he remained in Brown street for the purpose of rendering every assistance to the principal perpetrator which accident or the incidents accompanying the transaction might render necessary; and under such circumstances as will leave no reasonable doubt in your minds that he was a principal in the second degree in the murder for which he stands charged in this indictment.

My only object in the course I shall pursue in opening the cause, is to explain the evidence which shall now be offered the jury, and the law by which the jury are to be governed in its application to the case of the prisoner, with the utmost clearness and simplicity, and in such a manner as will best assist the jury in the progress of your duty.

It is manifest that it is most important the jury shall have a clear understanding of the law upon the subject of principals in the first, and principals in the second degree, in cases of murder. And I refer to the following principles of law, from approved authorities and writers on criminal law:—

Whether a person is a principal in the first or second degree, is a question of law, to be decided by the Court. 2 Stark on evidence, 6, note (v). 4 Burr, 2076.

A principal in the first degree, is the absolute perpetrator of the crime, actually present, and who inflicts the deadly blow. 2 Stark. 6. Hale, 615, 616. Hawk. c. 29 s. 11.

A principal in the second degree is one who is present, aiding and abetting the fact to be done.

In the construction of the statute of this Commonwealth, as to what constitutes presence, within the meaning of that statute, our late venerable and lamented Chief Justice, in his charge to the Grand Jury, at the present term of this Court, states to them, that

“It is not required that the abettor shall be actually upon the spot, when the murder is committed, or even in sight of the immediate perpetrator, or of the victim, to make him a principal.

“If he be at a distance, co-operating in the act, by watching to prevent relief, or to give an alarm, or to assist his confederate to escape, having knowledge of the purpose and object of the assassin, this, in the eye of the law, is being present, aiding and abetting, so as to make him a principal in the murder.”

The following are the authorities and cases which substantiate the position laid down by the late Chief Justice. To prove one to be a principal in the second degree, it must be shown, first, that he was present; second, that he was aiding and abetting. 2 Stark. 7.

But it is not necessary to show that he was actually standing by, within sight or hearing of the fact. Not an eye or an ear witness. 2 Stark. 7. 1 Russ. 30. Foster, 349, 350. 1 Hale 537.

As where one commits the murder and the other keeps watch or guard at some convenient distance, to prevent surprise, or to favor the escape of those immediately engaged. Foster, 350.

If several set out upon a design to murder, and each take the part assigned him, they are all present, in contemplation of law, when the fact is committed. 2 Stark. 7. Foster, 350. 1 Hale 439. Kel., 111. In general, if a party be sufficiently near to encourage a principal in the first degree with the expectation of immediate help or assistance in the execution of the felony, he is, in point of law, present. 2 Stark. 8. 1 Hawk. c. 32 s. 7. If several go on a design to commit burglary, and one only enter the house, and the others stand at the garden gate, or the lane's end, to watch, they are all, in law, principals. 2 Russ. 913 1 Hale 555. 2 Hawk. c. 29 s. 8.

Lord Dacre's case, who went to steal deer. One of the company killed the keeper, Lord Dacre and the rest of the company being in other parts of the park. And it was held that it was murder in them all; that all were present. It was sufficient that, at the instant the facts were committed, they were of the same party and upon the same pursuit of those who did the facts.

As to aiding and abetting, these words include every species of assistance, either by the acts or the assent, or readiness to further the general purpose. 2 Stark. 10. Foster, 350. For if any one comes for an unlawful purpose, although he does not act, he is a principal.

This allegation implies assent to the principal act, and must be proved by some act, done in furtherance of the commission of the crime, or that he was keeping watch, or that he was associated with the rest, in the common illegal object, in the furtherance of which the crime was committed. 2 Stark. 12. It is sufficient that the principal is encouraged from the hopes of immediate assistance from the abettor, whether he be in view of the fact or not. Hawk. b. 2 c. 29 s. 8. Salk. 334-5. If a person be present in the commission of a murder, though he takes no part in it, yet if it be done in private, as in cases of secret assassinations, and he does not endeavor to prevent it, nor apprehend the murderer, these circumstances may be left to the jury as evidence of consent and concurrence in the act. 2 Stark. 12. Foster, Disc. 3 s. 5.

The *Solicitor General*. After proving the murder, I shall move that J. J. Knapp, Jr., be brought into Court as a witness.

PUTNAM, J. I have no objection. He may be sent for while the witnesses to the facts of the murder are examined.

On the first trial the *prisoner's counsel* moved that the jury might

view the house where the murder was committed, and the ground in the vicinity, and the *Attorney-General* expressed his desire that the motion should be granted. But the COURT said: We refused such a request in another case, and it does not appear to us that a view is necessary. It is attended with many inconveniences. We know not what the jury may hear and what impressions may be made upon them while they are taking the view. The case should be decided by the evidence given in court.

Today the jury themselves requested that they might be permitted to see the place of the murder, and counsel on both sides expressed their desire that permission should be allowed. The *prisoner* likewise gave his consent. The COURT granted the request, but with hesitation, because they said this course was without precedent, and if it should turn out to be incorrect, they had doubts whether they could hold the prisoner to his consent. The Court directed that no person should go with the jury, except the officers having them in charge, and that no person should speak to them, under penalty of a contempt. Plans were exhibited and explained to the jury in court, and they were permitted to take them with them.

The COURT ordered J. J. Knapp, Jr., to be brought in, but the counsel for the prisoner objecting, he was ordered to be kept in some convenient place until wanted.

THE WITNESSES FOR THE COMMONWEALTH.

J. P. Saunders. I am a surveyor; the two plans produced of Mr. White's house and neighborhood are accurately drawn.

Benjamin White. Am a servant of Capt. White. On Wednesday morning, 7th April, about 6, on opening the shutters of the eastern window, saw the back window of the northeastern room open, and a plank put up to the window. Went into the front room, but saw no appearance of any one having been there. Then went to Miss Kimball's (the maidservant's) room, and told her, and then went into Mr. White's chamber at the back door, and saw that his door, opening into the front entry, was open, and that he was murdered. Went down and told Miss Kimball that Mr. White was gone. His face when I first saw him

was very pale—the bed clothes were turned down. I saw some blood upon the side of the bed, or on his flannel. I then went to Mr. Mansfield's door, who lived opposite, and knocked; then to Mr. Deland's, then to Dr. Johnson's, and then to Mr. Stephen White's. Mrs. Beckford, the captain's niece, myself and Miss Kimball, a domestic, lived at the house, but Mrs. Beckford was away that night. Capt. White went to bed that night about 10. He was 82 years old; rather deaf. He was not in the habit of keeping lights burning. There was a poker in the parlor; none in the chamber; there was nothing missing from the house. Prisoner married a daughter of Mrs. Beckford. Have seen him at the house often; he had free access to all the rooms.

Mr. Webster. Before any other witness is called, I wish to understand the rule of Court about the exclusion of witnesses from the court room, and that it may operate equally upon both parties, for the Court has excluded Joseph J. Knapp, Jr. Such exclusion is, I am aware, the English practice, but not, I believe, of our courts.

Mr. Dexter. I must insist that all the witnesses be excluded.

The COURT. All who have been summoned and expect to testify must not be present during the examination of any witnesses. We consider it the right of the prisoners.

Lydia Kimball. Was a servant at Capt. White's. Did not hear any noise during the night. Benjamin came to my door and told me that someone had been into the house, for that the back window was up; went down into the front room to see if anything had been stolen; told him to go up and tell Mr. White; he came down and told me to be calm; that Mr. W. had gone to the eternal world; he then went to call the neighbors. Had lived with him 16 years. The day after the murder a cloak was left at the house by a young man I did not know. He said, this is my brother's cloak.

Dr. Samuel Johnson. About 7 o'clock was informed that Capt. Joseph White had been murdered in his bed. Went to the house in company with

Stephen White; found the body lying on the right side; there was an appearance of a violent blow on the left temple, inflicted by some unknown instrument; also 13 stabs on the left breast, near and about the cavity of the heart. A jury was summoned, who returned the verdict that "the said White came to his death by a blow on the left temple, and by 13 stabs in the left side, in and near the chest." The instrument which gave the blow on the head was probably something like a loaded cane—blunt; that which gave the wounds was shaped like a dirk. There was no appearance of a struggle; nor that more than one weapon was used to give the stabs. Think it had been done three or four hours before I examined the body at 6 a. m.

The *Attorney General* said that he had now proved the murder to have been committed; he should next endeavor to prove a combination to commit the murder, and for that purpose his first witness would be Joseph Jenkins Knapp, Jr.

Joseph J. Knapp, Jr., was placed upon the stand.

The *Attorney General* asked him if he was willing to testify.

Prisoner declined by shaking his head.

The *Attorney General.* What reason do you give?

Mr. Dexter objected.

The COURT said he was not obliged to state his reasons for refusing. It is only necessary that this should be understood, so that there may be no difficulty hereafter. The Government say they have pledged themselves not to proceed against him if he would testify; he does not testify, and now that pledge is recalled.

Mr. Webster. We wish to proceed according to the usual course.

I should suppose that he should be sworn, and then he may answer that he cannot testify without criminating himself.

Mr. Dexter. He does not complain of the course pursued.

Mr. Webster. His counsel say that he can have no right to complain, and the Government are content.

The Attorney General. You still refuse to testify, do you?

He nodded assent.

The Attorney General. The evil be upon your own head.

Mr. Dexter. It was stated by the Attorney General, in his opening, on the former trial, that Knapp would refuse to testify, in pursuance of advice of counsel. I feel it my duty to state distinctly that I have never given such advice.

Mr. Gardiner. And I have never given such advice.

The Attorney General. But other counsel have had access to the prisoner.

Mr. Dexter. The only other counsel who has had access to him is ready to make the same statement.

The Attorney General. We shall endeavor to prove the company of other witnesses; we maintain that in a case of this nature the act of one is the act of all.

Benjamin Leighton. Have lived with Mr. Davis, at Wenham, at the house where Mrs. Beckford and Joseph J. Knapp, Jr.'s family live, since 6th October last. The Friday before Capt. White was murdered, about 2 in the afternoon, I went down to the lower end of the avenue, got over the wall, and sat down by the side of the gate. Heard men talking on the other side of the wall. Looked round through the slats of the gate and saw the two Knapps. When they came near the gate, Joseph said, when did you see Dick? Frank said, I saw him this morning. Joseph said, when is he going to kill the old man? Frank answered, I don't know. Joseph said, if he does not kill him soon I will not pay him; then they turned back, and I did not hear anything more. They did not know I was there. Shall be 18 years old the 30th of next December. Am under no mistake about the conversation; I am sure of the persons. Jos. J. Knapp, Jr., has

lived in the house where I lived. John Francis Knapp came to the house frequently. Frank came up to Wenham one evening, after the murder, in a chaise, about 9 o'clock; about a fortnight or three weeks after the murder. Believe Mrs. Beckford was living there then. There was a gentleman in the chaise at the door; I did not know him, but he was a slim man, not so thick as Frank Knapp. I went to the door when the chaise drove up; Frank got out and went in, and asked if his brother Joseph was at home. Joseph Beckford said he was. Joseph Knapp met Frank at the inner door, and they went into the room together, and shut the door. They were together, I should think, an hour; nobody was in the room with them.

Cross-examined. The house is about 50 rods from the road; heard the conversation near the gate to the pasture, at the lower end of the avenue. Was sitting under the wall, to wait for Mr. Davis, and to take a little noon-

ing; I mean a little rest. Did not say anything to Mr. Davis about the conversation I had heard. Have been called upon to tell what I knew about it, by Mr. Waters and another gentleman I did not know; told them I could not recollect, at that time, that I had ever told anything about it. Did not tell them I knew nothing about it. They asked me if I recollected telling Mr. Starrett anything. I told them I did not. Mr. Starrett was there, and they talked with him. They asked me if I knew anything about Frank Knapp. Told them I did not. Was asked if Richard Crowninshield had been at the farm, and I said I did not know him. Did not then remember that I had told Starrett anything about it. They bothered and frightened me talking to me, and I could not remember. Mr. Starrett told Mr. Waters that I had told him something, but I could not recollect it, and told them so. Saw Mr. Waters again last Saturday, at Lummus' tavern, in Wenham. He came there with Mr. Choate and Mr. Treadwell. They wanted me to tell what I knew; told them I had been down to Salem, but could not recollect then; I was in a strange place, and frightened. They talked to me so that I could not recollect. Then I recollected what I had told Starrett, and told them the same story I have told today. They did not tell me they had a warrant against me. Mr. Davis afterwards told me they would carry me off, if I did not tell all I knew; they did not threaten me.

Re-examined. On the day after the murder, I went into Star-

rett's shop, and he said, what is the news about the murder? I said, they think I don't know anything about it, but I know a little more than they think I do. I spoke before I thought. I was unwilling to say anything more, because if they got hold of this, I was afraid they would kill me. Frank used to be round me, with his dirk, and pricking me with it; he did this more than once, and other persons saw it. Thomas Hart saw it. The first time I told the conversation to anybody it was to Hart, and it was not long ago. I next told it to Mr. Waters. Told Starrett I overheard something, but did not tell him what. This was when going home from Salem; before this, I had told Hart, down in the field. No threat has been used to make me testify. Was frightened when I was carried to Mr. Waters' office, for I was taken suddenly, and from the field; they carried me by the court house, but the Grand Jury had been dismissed.

Cross-examined. The first time I saw Francis Knapp have a dirk was after he was attacked at Wenham Pond, after the murder. Starrett did not ask me what I knew; did not ask me what I had overheard. Heard there was a reward offered. Told Mr. Starrett before I heard of the reward, but did not tell the conversation till afterwards. Did not know what the reward was. Am afraid now if the Knapps get clear they will kill me.

Mr. Dexter. So you don't mean they shall?

Rev. Henry Coleman. Had no personal acquaintance with prisoner until the 28th of May, when he was examined before Justice

Savage. On the afternoon of that day, went to his cell with his brother, Phippen Knapp, at his (Phippen's) request. When we went in, Phippen said, well, Frank, Joseph has determined to make a confession, and we want your consent. Am not able to give the reply of the prisoner, in his precise words, but the effect was that he thought it hard, or not fair, that Joseph should have the advantage of making a confession, since the thing was done for his benefit or advantage. His words, as nearly as I can recol-

lect them, were, I told Joseph, when he proposed it, that it was a silly business, and would only get us into difficulty. Phippen, as I supposed, to reconcile Frank to Joseph's confession, told him that if Joseph was convicted, there would be no chance for him (that is, for Joseph), but if he (Frank) was convicted, he might have some chance for procuring a pardon. He appealed to me, and asked me if I did not think so? I told him I did not know; I was unwilling to hold out any improper encouragement."

Mr. Dexter. We object to any continuation of this confession. It is now in evidence that Phippen, with a view to reconcile Frank to Joseph's confession, told him that if he were convicted, he might have a chance of pardon. This was a direct inducement to a confession.

The COURT said they would hear the counsel for the Government.

Mr. Webster. It appears to me exceedingly plain, that this confession is admissible. It is a general principle of law, that the confessions of a party are evidence against him, except in those cases where they have been obtained by improper influence. There is no doubt about the rule, the difficulty is in the application. We propose to prove the confession of the prisoner. Against this, generally, there can be no objection. Then, if this case be within the exception to the rule, it is for the other side to show it. We deny it, altogether. We say the only exception is, when a confession is obtained by menace, or hope of favor. In this case, there is no proof of any encouragement, or any threat. There is no evidence to show that the confession was not entirely voluntary. This person, Phippen Knapp, went to the cell of the prisoner, and told him that his brother, who was confined upon the same charge, had confessed, and asked his assent to that confession. The prisoner knew of no confession, whether it would affect him or not. His brother (Phippen) thought it expedient to ask his assent to his brother's confession. There is no other fact in the case. No confession was asked from him; but in the course of the conversation, he stated certain truths. The Government is entitled to the benefit of those truths, unless he protects himself by some known rule of law.

The books tell us, that to exclude confessions, it must be shown that they were made under the influence of fear, or the hope of reward. What is the evidence in this case? Did they say to the prisoner, it would be better for him to assent to Joseph's confession? Just the reverse. It would be worse for him, but on the whole, it would be better. There was no intimation that it would

be better for him to assent. What promise or encouragement was there? Not the least, but just the reverse.

What we now propose to prove, is the confession of the prisoner himself. It is not enough that he thought it would be better for him to confess. That is no objection to a confession. Everybody thinks it would be better to confess, or confession would never be made. The question is, whether the confession was the spontaneous operation of his own mind; if so, then it was voluntary, and we must have it. The Court can only look to what was held out to him. Any other course would be to leave fact and follow hypothesis.

The object of the conversation was to reconcile him to a worse state of things. But this is not the strong view of the case. The prisoner was under the influence of no hope, under the influence of no fear, under the influence of no persuasion. If there ever was a voluntary confession, on the face of the earth, this was one.

Mr. Gardiner. We contend that this confession comes within the exception to the rule. The general rule is, that confessions are evidence, unless they are obtained by means of improper influence. If there be any influence, however slight, the confession cannot be used.

This is, at best, the weakest kind of evidence. The idea is absurd, that a person, charged with a capital crime, will confess, unless some influence is used. And it is laid down by Blackstone, and by Foster, and other writers, that it is the weakest kind of evidence; the most liable of all to be mistaken. The witness, in this case, cannot give the words of the prisoner, except in part. His testimony consists partly of the words of the prisoner, and partly of his own inferences.

We do not differ in principle, but in fact. Frank was told, if Joseph confessed, there would be more chance for his (Frank's) procuring a pardon. It is not necessary for us to show the degree of influence used.

Mr. Dexter. In books on evidence, confessions are sometimes called the weakest evidence, and they are sometimes stated to be the strongest. One reason why they are called the weakest kind of evidence, is because the witness cannot give the precise words, but only their effect. Such a confession is no confession at all. To bind the prisoner, we must have his words.

If this confession goes for anything it must be to the guilt of the prisoner; if it was a mere consent to Joseph's confession, then it is not evidence. The natural import of the words, as they came from the witness, was, if Joseph is convicted, he will have no chance; if you confess and are convicted, there will be a hope of pardon. This holds out a direct inducement to confess. This is the natural import of the words. The legal effect may be different, but the prisoner is not a lawyer.

Mr. Webster. The import of the words was not such as has been argued. But it was saying Joseph has no hope, but in confession you have some. The thing to be avoided in Joseph's case was a

trial, and he was by disclosure to avoid that trial. It was asking him to consent to Joseph's confession as something perilous for him, but the only salvation for his brother. I have a right to ask for the confession until it is proved that some threat or promise was made. I propose to ask the witness for Frank's confession of facts within his own knowledge, wholly unconnected with Joseph's confession. And unless he was told that it would be better for him to make such a confession it is admissible.

MORTON, J. The witness was proceeding to relate the confession of the prisoner, when some expressions came out, as it is contended by the counsel for the prisoner, which would make the subsequent conversation improper evidence. Confessions are not always evidence against a prisoner. Experience proves that men are sometimes led to confess what is not true. It is a general rule that confessions are admissible; the exception to the rule is when confessions are obtained by means of threats or promises, when made under such influence, they are inadmissible.

It was supposed that the witness was about to go on and state the disclosure of Joseph, and the question to the prisoner was whether he assented to it. This, if it implied his own guilt, would be important evidence; if not, then it would be irrelevant.

It seems to me very clear that there was a direct inducement held out to him to confess, because he did not assent to Joseph's confession before it was said to him, that there might be some chance for pardon. I am therefore well satisfied that such an inducement was held out, that the conversation should be excluded.

But it seems to be the object now to show statements made at the same time, besides assenting to Joseph's confession.

It seems to me that the same inducement would operate through the whole conversation; whether it would extend to a subsequent conversation or not, it is not necessary to decide. I am therefore of opinion, that not only his assent to Joseph's confession, but any declaration made at the time must be rejected.

WILDE, J. I am of the same opinion; though it is a case of considerable difficulty. I do not place my opinion on the nature of the evidence, as was urged by the counsel for the prisoner. The rule of evidence in all cases, capital, as well as others, is the same; that the slightest influence of hope or fear, is sufficient to exclude the testimony. Then what influence was there in this case? It was the object of Phippen Knapp to obtain the prisoner's assent to Joseph's disclosure. Phippen remarked to the prisoner that there would be no chance for Joseph, if convicted, but for the prisoner there would be a chance for pardon, and appealed to the witness, who declined giving an opinion, because he would not hold out any improper encouragement. His assent would be an implied admission of his participation in the guilt. This must necessarily be evidence of a confession, whether direct, is not the question; if of any description, then it comes within the exception.

The next question would be upon the testimony to the admission of facts stated by the prisoner as within his own knowledge. If

inducement is held out to the prisoner at one time, and he afterwards confesses, that evidence is to be rejected.

PUTNAM, J. I entertain a somewhat different view of this question. I lay out of the case all consideration of the weight of the evidence. The Government offer to prove the confession of facts tending to show that the prisoner was guilty of the charge against him. Such evidence is either the very best or the very worst; if the confession was made without hope or fear, it would be the best evidence.

Confessions are generally evidence. Then is this case within the general rule? Neither fear nor hope existed in this case. The object in going to Frank's cell was to ascertain if he would consent to Joseph's confession. And it is said, that if he assented to Joseph's confession, this would be evidence against him. But it seems to me most evident that it is not so. The object of the Government now is, to prove some independent confession of his own.

It was not the subject of the conversation, whether Frank should make a confession. It seems to me we stop *in limine*. It is not the question whether he consented to Joseph's confession, but if he stated any fact within his own knowledge, without the inducement of hope or fear. And it seems to me that there was no inducement to confess, held out to him. Any confession made at that interview, should, I think, be admitted. But I am controlled by the opinion of my learned brethren, who think that anything said by the prisoner, after what Phippen said to him, is not admissible.

Mr. Colman. It was just at the close of the interview, that Phippen appealed to me. He had told Frank, more than once, in the course of the conversation, that there might be a hope of pardon.

The COURT directed the witness to state all that was said in relation to encouragement.

Mr. Colman. Early in the interview, Phippen said that Joseph had decided to make a confession, etc. (as above), and afterwards repeated this, and appealed to me. Frank then asked me to use my influence, or interest, for him. I told him that I could promise nothing, but that I thought his youth would be in his favor. Have stated all the encouragement that was given. There was not the least encouragement given to him, either by me or in my hearing, to relate facts within his own knowledge. Soon after this interview I found the club under the north steps of the church, in Howard street. I went there on the 20th of May, about 1 o'clock, with Dr. Barstow and Mr. Fettyplace. The steps are of wood—under the lower one there is a rathole—in it I found this club.

Mr. Webster. Who told you it was there?

Mr. Dexter. I object to this question. The finding of the club is all that can be given in evidence. This question is introduced to criminate the prisoner and therefore it is not admissible; for it is criminating him by his confession of that fact, and no part of the

confession is evidence. I call the attention of the Court to the principle, which is to give his confession against him, which has already been ruled out.

The Court. We are very clear that it is competent for the Government to prove that this club was found in consequence of information from the prisoner.

Mr. Colman. Frank Knapp gave me precise directions where to find the club, and I found it as nearly as possible, in the place pointed out by him.

John C. R. Palmer.

Mr. Gardiner. We object to him, on the ground of want of religious belief.

The Court. You have your choice of the mode of proof, but if you inquire of him you cannot prove it in any other way.

Mr. Gardiner. Do you believe in the existence of Divine Providence, and in a future state of rewards and punishments. A. I do.

Mr. Webster. We now expect to prove a conspiracy, between the two Knapps and the two Crowninshields, to commit this murder; having done that, we propose to prove acts done by all, in pursuance of the common design.

Mr. Gardiner objects to this course, because it is never pursued except in conspiracy and treason.

The Court. We are satisfied with the course pursued by the Government.

Palmer. Have seen prisoner at Crowninshield's, in Danvers. The first time, he came on the afternoon of 2d April, with a young man named Allen; they came on two white horses. Saw prisoner in company with George Crowninshield. Saw them from the window of the chamber; they walked away together. I did not see them again till after four.

Richard was with Allen. All four returned about 4. Allen and Frank then went away on horseback. George and Richard immediately came into the chamber where I was.

Mr. Dexter objects to asking what agreement the Crowninshields said they had made with Frank Knapp.

The Court. The Government intend to prove a conspiracy—they may begin at either end.

Palmer. There was then a conversation between us about the proposed murder of Capt. White—both George and Richard spoke of it. George, in the presence of Richard, proposed to me to take a part in this murder for one-third of the \$1,000 they were to receive from Joseph Knapp. Richard said it would be easy to meet him that night and over-set Mr. White's carriage, for George said he had gone out to his farm. Joseph Knapp's object in the murder was to have a will destroyed. George said to me that I was poor, and in want, and had no funds, and that this would be a good time to supply that want. George said that the housekeeper would be away at the time of the murder. Frank came again on that day, about 7 o'clock in the evening, in a chaise and alone. He stayed then over half an hour. Richard went away with him in the same chaise. Did not see Frank afterwards, till this time, but Richard came home about 12 o'clock that night. The will was to be destroyed by Jo-

seph Knapp, who could get the keys from the housekeeper, and have access to the trunk in which it was kept. This will Joseph wished destroyed, because it gave all Mr. White's estate to a Mr. White, then living at the Tremont House, in Boston. Next saw the Crowninshields at their house, in Danvers, on the night of 9th of April, about 12 o'clock. Spoke under their chamber window to George, who opened it, and asked who was there. I told him and asked him to come down. He came down and asked if any one was with me. Told him no. He then let me in, and asked me if I had heard the news in Salem. On the evening of 27th saw the Crowninshields again at their house, about 10 o'clock. Stayed till 29th. Richard gave me four 5-franc pieces; asked him to let me have it, and promised to return it. Then went to Belfast by water with Capt. John Boyle. While at Belfast, I wrote a letter to Joseph J. Knapp.

Mr. Dexter. I object to reading the letter.

PUTNAM, J. Its bearing upon the prisoner should appear.

Mr. Webster. It was received by his father, and the prisoner to divert suspicion, caused two other letters to be written.

The Court. Let these first be proved.

Wm. H. Allen. I put these letters into the Salem postoffice on Sunday afternoon, May 16, between 5 and 6, at the request of J. J. Knapp, Jr. He said his brother Phippen and his father came up to Wenham the day before, and brought an anonymous letter from a fellow down East, and which contained a devilish lot of trash, such as, I know your plans, and your brother's, and will expose you if you don't send me money. He said that they had a good laugh upon it; that he requested his father to give it to the Committee of Vigilance. What I want to see you now for, is to have you put these letters into the postoffice, in order to nip this silly affair in the bud.

Mr. Webster read the letter.

May 13, 1830.

Gentlemen of the Committee of Vigilance:—

Hearing that you have taken up four young men on suspicion of being concerned in the murder of Mr. White, I think it time to inform you that Stephen White came to me one night and told me if I would remove the old gentleman, he would give me 5,000 dollars; he said he was afraid he would alter his will if he lived any longer. I told him I would do it but I was afraid to go into the house, so he said he'd go with me, that he would try to get into the house in the evening and open the window, would then go home and go to bed and meet again about 11. I found him and we both went into his chamber. I struck him on the head with a heavy piece of lead and then stabbed him with a dirk, he made the finishing strokes with another. He promised to send me the money next evening, and has not sent it yet, which is the reason that I mention this.

Yours, Etc.,

Grant.

(This letter was directed on the outside to the "Hon. Gideon Barstow, Salem," and put into the postoffice, on Sunday evening, May 16, 1830.)

Lynn, May 12, 1830.

Mr. White will send the \$5,000 or a part of it before tomorrow night, or suffer the painful consequences.

N. Claxton 4th.

(This letter was directed on the outside to the "Hon. Stephen White, Salem, Mass.," and put into the postoffice in Salem, on Sunday evening, May 16.

Mr. Webster now read the Palmer letter.

Belfast, May 12, 1830.

Dear Sir—I have taken the pen at this time to address an utter stranger, and strange as it may seem to you, it is for the purpose of requesting the loan of three hundred and fifty dollars, for which I can give you no security but my word, and in this case consider this to be sufficient. My call for money at this time is pressing or I would not trouble you; but with that sum I have the prospect of turning it to so much advantage, as to be able to refund it with interest in the course of six months. At all events, I think that it will be for your interest to comply with my request, and that immediately; that is, not to put off any longer than you receive this. Then set down and enclose me the money with as much despatch as possible, for your own interest. This, sir, is my advice, and if you do not comply with it, the short period between now and November will convince you that you have denied a request, the granting of which will never injure you, the refusal of which will ruin you. Are you surprised at this assertion—rest assured that I make it, reserving to myself the reasons and a series of facts, which are founded on such a bottom as will bid defiance to property or quality. It is useless for me to enter into a discussion of facts which must inevitably harrow up your soul—no—I will merely tell you that I am acquainted with your brother Franklin, and also the business that he was transacting for you on the 2d of April last; and that I think that you was very extravagant in giving one thousand dollars to the person that would execute the business for you—but you know best about that, you see that such things will leak out. To conclude, sir, I will inform you, that there is a gentleman of my acquaintance in Salem, that will observe that you do not leave town before the 1st of June, giving you sufficient time between now and then to comply with my request; and if I do not receive a line from you, together with the above sum, before the 22d of this month, I shall wait upon you with an assistant. I have said enough to convince you of my knowledge, and merely inform you that you can, when you answer, be as brief as possible. Direct yours to Charles Grant, jun. of Prospect, Maine.

Palmer. Cross-examined. On the night of the murder was at Babb's, the half-way house in Lynn. Can't tell every place I have lived in between my visits to Salem—at New York part of the time and at home in Belfast. Was there occupied in cutting

stone for the State. Don't know who employed me in behalf of the State. While in Salem, I bore the name of Carr. While at Danvers I lived with the C's in their room, apart from the rest of the family. Came from jail today. Have been there since

June last, and have been visited by Mr. Colman, Mr. Stephen White, my father, etc. Was brought up from Belfast in irons. I made the disclosure from my own wish and was not compelled to do it. While at Babb's I bore the name of George Crowninshield. I have been told that I should not get the reward and have no expectation of it—perhaps I expected part of the reward when I wrote the letter which I wrote to see if Joseph Knapp was connected with the murder. Was told by the C's that it was only a joke when they proposed it, and did not think them serious until after the murder. Have never complained of of the officers of Government, and have refused a pardon from them in this case.

Wm. H. Allen (recalled). On April 2 Frank Knapp and I stopped at Dustrup Hotel. He proposed the visit to the C's. We first met Dick—he invited us in, and in a few minutes George came in. Dick went to show me the factory and we separated from George and Frank at the house. After going through the factory George and Frank rejoined us, and after talking a few minutes Frank and I left them and came home. We visited them also once last winter. One evening, about three weeks after the murder, Frank and I met Dick in Bath street. I thought they might have something private and was walking away when F. said, stop a minute and I'll join you. Frank's usual dress was a dark frock coat, and a glazed cap with a large glazed star on the top, and a camblet cloak.

William Osborne. Kept a liv-

ery stable in Salem; Francis Knapp was in the habit of hiring horses and chaises of me. On the 1st April he had a horse and gig to the Lynn Mineral Springs. On the second he had a saddle horse to Dustings. William H. Allen had a horse at the same time. On the 3rd a saddle horse to Wheeler's, about half a mile from Dustings. It was charged on that day. On the 5th he had a saddle horse to Wenham. On the 6th, place left blank. On the 19th, horse to Wenham.

Cross-examined. Make charges when horses are given out. Don't know when Francis Knapp came from sea. He rides considerable. Don't know where they go. Leave a blank till I ascertain. Frank may have altered the book. Always trusted him. He hired horses and chaises frequently. Not often hired horses in the evening, but did afternoons. Can't tell much about the time of day by my method of charging.

Thomas Hart. Lived with Mrs. Beckford, at Wenham; went there 9th of April. Joseph J. Knapp hired me; know Francis Knapp. Mrs. Beckford went there to live 15th of April afterward. Frank went about the 28th of April; saw him there the 25th of April last, about dark. Saw the Captain (J. J. K.) and was with him about a quarter of an hour; they were alone in a room together. Francis wore a hat and camlet wrapper. There was no peculiar money given me, or of a peculiar stamp, except that on the Tuesday after, some five-franc pieces were given me to buy meal with. Thought I heard three voices in the chaise, at the time spoken of—was con-

fidest of it when it was going away at half past 7. Francis Knapp usually wore a dagger, and used to prick Benjamin with it, telling him, at the time, it would not hurt him but a minute; he would come into Benjamin's room to do this, when he was in bed. This was after the murder.

Esra Lummus. Live in Wenham, and keep a public house there, about a quarter of a mile below where Mrs. Beckford lives, Saw Dick Crowninshield at my house for the first time, in the latter part of March. He and a young man, I didn't know who, came to my house on that day; left their chaise; went away and were gone sometime. The man with Dick had on dark clothes and a glazed cap, I think. Ten days or a fortnight after the murder Dick came again with a person whom I did not know. They paid their bill with a five-franc piece, and my wife brought it to me for examination, and I gave the change to Dick.

Mrs. Lummus. Some persons were at our house about the 24th or 25th of last April, and passed a five-franc piece. Carried the five-franc piece to my husband. Can't say positively whether this was before or after Mrs. Beckford came to live in Wenham, or before a certain robbery heard of there.

Cross-examined. I did not know either of the young men. One had a dark dress, but I don't know how the other was dressed. Am not certain that this was before the Knapps' robbery.

Josiah Dewing. Came home from sea last spring, and brought from 3,000 to 4,000 five-franc pieces. About 500 were for Jo-

seph Knapp, Jr., and were brought from Point Petre, Guadaloupe, and paid to him; all but his went into the bank, as a deposit. I have the receipt of Joseph for his portion.

Cross-examined. Have been a shipmaster several years. It is nothing unusual to bring home five-franc pieces. Don't recollect bringing home any lately, on any other occasion.

Daniel Marston. Know George Crowninshield; in the course of last spring received from him two five-franc pieces; on Saturday, the day before his arrest.

Cross-examined. Keep a victualling cellar. Five-franc pieces are not a common currency. Do not often take them; not so often as hard dollars.

George Smith. Attend Mr. Chandler's grocery store. On the evening before the Crowninshields' arrest received from some person, and in the presence of George Felton a five-franc piece.

Cross-examined. Have frequently received them from other persons.

George Felton. Know George Smith; went into Mr. Chandler's store with George Crowninshield when he paid Smith a piece of silver.

Joseph Shatswell. Capt. Dewing brought home some five-franc pieces for Joseph Knapp, Jr., last spring and they were paid to him. Those that belonged to the owners were deposited in the Mercantile Bank, and remain there now.

Cross-examined. Have had them come home frequently. I take about three hard dollars to one five-franc piece. I have traded to Guadaloupe five years,

and the return has principally been in five-franc pieces.

Stephen C. Phillips. Was one of the Committee on Vigilance. The two Knapps came before the committee at their request to give an account of a robbery, said to have been attempted upon them at Wenham.

Mr. Dexter. I object to any proof of this robbery.

Mr. Webster. It is always competent to prove what persons under suspicion do to divert that suspicion. I cite to this point.

Mr. Dexter. Such evidence is just as if that of a generally bad character was given to the jury; besides, it is not within the rule laid down by the Court in relation to anonymous letters. This is also a distinct crime.

The COURT. It is now proposed, by the counsel for the Government to prove that the prisoner got up a fictitious robbery. This is objected to, on the other part, because it is a distinct offense, and has no relation to the crime now charged. It is now clear that the Government may prove that the defendant took measures to divert suspicion from himself, and it would seem to follow that any evidence which tends to this point is admissible. The Court will take

care in charging the jury to give such evidence its proper direction, and its weight will be left to them.

Mr. Phillips. Have known Jos. Knapp some years, but have never known Frank. On Tuesday, 27th April, it was stated in town that the Knapps had said they had been attacked at Wenham. The Committee thought it proper to make inquiry into this affair. The Knapps appeared before them, on the evening of 27th. I took minutes of their statements. Have these now with me and can state more fully by referring to them. They are in my own handwriting. The questions were chiefly addressed to Joseph in the presence of Frank. Believe these minutes were read over to them, for this was our general practice.

The COURT. These minutes may be used as a memorandum to refresh your recollection and if they are proved to have been read, they will become evidence.

Nath'l Kinsman. I am one of the committee, and was present on that evening. They were read to the prisoner and his brother and they assented to them. Joseph was the narrator.

The COURT. They may then be read.

"Tuesday evening, April 27, 1830. Left Salem at half past 8 o'clock, in a chaise for Wenham. About twenty minutes after 9 o'clock, within a few rods of Wenham Pond Hill, so-called (this side of the pond), saw three men, in the middle of the road, walking towards us. The two on right and left seemed to step forward a little, leaving the center one in the rear. The center one stepped up and took the horse by the bridle with his left hand and seemed to be taking out an instrument with his right, an appearance of an ivory dirk handle. This fellow was dressed in a dark short jacket (a sailor's jacket), cloth cap, not glazed, did not notice pantaloons; dressed like a sailor, but did not act like one. White men; had two black marks (smouches) on their cheeks to resemble whiskers;

not real whiskers. The fellow who seized the horse, said 'How do you do?' or something of the kind. Then he said, 'Where are you going?' or 'where are you bound?' My brother answered, 'I will let you know d—d quick,' and my brother then drew his sword-cane. In the meanwhile, I struck the one who came up on the right with the whip. This last fellow took hold of the handle of a trunk at the moment I struck him. I struck him across the right cheek. The fellow on the other side, at the same moment, made a motion to shove the trunk across the chaise. The fellow whom I struck with the whip wore a long coat, dark, without bright buttons, hat, no whiskers; was a stout man; all pretty good-sized men. The one who came up on the other side of the chaise was very tall and square, stout whiskers, apparently false, black hat, straight coat of a dark color. Francis made his reply to the man who held the horse, and immediately drew his sword-cane and made a pass at the fellow who came up on the left. As he struck, the fellow sprang back. Francis then sprang out of the chaise and made another pass at him; the fellow ran and got over the stone wall before he could reach him. The fellow who came up on the right passed round back of the chaise, and then made off over the wall in the same direction as the other. The fellow who held the horse's head ran off at the same time, and in the same direction. All went over stone wall, or left-hand side of road towards Wenham Pond. Francis Knapp then returned to the chaise; and just as they were starting, heard a shrill whistle. We heard the mail stage pass just as we got to our house. Think the fellows, or scouts employed by them, may have heard the mail stage coming along; and therefore whistled to alarm the rest. Perhaps whole detention did not exceed three minutes. Old house near spot (distant, say, as far as from here to common) occupied by an old woman—doubtful character—am inclined to suppose it a house of ill fame; this old woman was yesterday twice on our premises—called once for milk—was never at the place before; her name is Wheeler. I left farm in afternoon and was probably seen to pass by people in this house. The fellow at whom Francis Knapp made a pass leaped over wall without touching it."

Mr. Phillips. Frank added that the fellow leaped over the wall without touching it. He also said that if he should be attacked again he was prepared to give them cold lead. These men described by the Knapps corresponded to some men who had been suspected. The men seen in Brown street were described; believe the one as having on a coat and the other a short jacket and cap. Concerning these last,

we had at that time but little information.

Cross-examined. We had before inquired particularly about the dress of certain suspected persons. The appearance of persons described by the prisoner bore some general resemblance to persons publicly described. The committee consisted of 27 members and we met every night for some weeks. No leading questions were put to the prisoner by

the committee during the examination.

Warwick Palfray, Jr. Am the editor of the Essex Register, and published this number. It is dated May 3, 1830. Know the Knapps perfectly well, and having heard several reports in circulation respecting the robbery in Wenham, I applied to them for an account of it. They gave it to me at the news room, and on my return to my office I reduced it to writing, and published it as I received it from their mouths. Did not show it to them after it was written. I think Joseph J. Knapp, Jr., gave me the particulars.

Cross-examined. Had no doubt at the time that the statement was true.

Nehemiah Brown. Am the keeper of the Salem jail. On the 15th of June, a little before 2 o'clock in the afternoon, had occasion to go into George and Richard's room, to carry notes. Called at Richard's room, but had no answer. After calling on him for a second time, I looked over the top of his door and saw him hanging at the grate. Called turnkey and went in. He was hanging by two handkerchiefs. Took him down. Called in physicians. They attempted to restore life, but without success. Then sent for a coroner.

The *Attorney General* read the inquisition on the body of Richard Crowninshield, Jr. The verdict of the jury was *felo de se*.

Mr. Brown. The Rev. Mr. Colman visited the cells of the two Knapps, both on the same day. Richard C.'s counsel had access to them when he chose.

Richard Burnham. On the evening of the murder, about 8,

saw George Crowninshield, with two others, in Essex street, near Franklin Building about 60 rods from Capt. White's house, near Newbury street. They were going toward the eastward. One of the persons with him was Chase. Did not know the other.

John McGlue. On the night before the murder, about 8:30, saw Richard Crowninshield, Jr., standing opposite Capt. White's house; he had his head turned up, so as to look up towards Coffee House. Asked me if I was going further. I told him no, and he continued on.

Benjamin S. Newhall. Saw George Crowninshield on the evening of the murder, April 6, passing down Williams street, a little before 10 o'clock. There was a person with him whom I did not know. He had on a glazed cap.

Thomas W. Taylor. Saw George Crowninshield on the evening of the murder, after 9, passing by door of my store in Newbury street, which runs down by the Common. A man was with him, whom I did not know.

Joseph Anthony. On evening of the murder saw George Crowninshield going from Essex street into Central street. Two other persons were with him. One was Chase; the other I did not know. George had on a short jacket and fur cap. They were talking.

Benjamin Horton. A year ago last spring, I saw Richard and George Crowninshield at Lynn Mineral Spring Hotel. Chase was sitting near Richard Crowninshield. Saw dirk in Richard Crowninshield's bosom. Dick told me it was his nurse child. Richard commonly carried it

with him. The blade was from five to six inches long. The handle was bone or ivory. Called on them about fortnight after murder, to see if they would say anything about murder. Saw Richard Crowninshield near workshop. He went into the house when he saw me. Afterwards came out, and we bid each other good morning. George came out soon after, and asked when I came from Portland, and if any kind of gaming could be carried on down there, as he and Dick thought about going down there; said they intended to go down, but meant first to make a raise at election.

Cross-examined. Mr. White suggested to me the expediency of going out to Danvers to see the Crowninshields. Went to see if they would tell me who murdered Capt. White, but did not tell them so.

Stephen Myrick. Live directly opposite to the corner of Mrs. Andrews' yard, on north side of Brown street. About 15 minutes before 9 on the evening of 6th April, I saw a man standing at a post, directly opposite my shop, on the opposite side of the street. Did not know him. He remained there apparently waiting for some one—this led me to be more particular in noticing him. He stood thus till the bell rang for 9, changing his situation a little. After the bell rang, went out as usual and shut my shutters, but did not put up the slide to my door, so that I might see if any one came to meet him. He walked back and forth twice, if not more. When any one came down Brown street he went into Newbury street, and then turned so as to meet him at the corner;

and if any one came down Newbury street he went into Brown street, and turned to meet him in the same manner. Stood to see if any one should come to meet him. He remained there till 20 or 30 minutes after 9. Did not see him go away, and he was there when I shut up and went home. He had on a frock coat which came round him very tight, and was very full at top and bottom; it was of a dark color. Can't say what he had on his head. Did not observe his face at all. Never saw prisoner till he was brought before the Grand Jury. It is my belief that he was the man at the post.

Mr. Dexter. I object to mere belief.

Mr. Webster. In questions of identity it is always admissible. Have you, as you know, or believe, seen that person since? A. I think I have seen him since.

Mr. Webster. Where have you seen him, and what name did he bear? A. I think I saw him when he was brought up before the Grand Jury, and when he was brought up once or twice since. Think it was Francis Knapp. Can't swear positively, but believe it was he.

The COURT. Was this belief derived from personal observation, or from what you have heard from others? A. From both; that is, from my observation at the time, and from the description of the person seen that evening.

The COURT. From your own observation alone, do you say it was Frank Knapp? A. No, I should not. Can't say positively, from my own observation. But the size and height of the

man I saw correspond very nearly to prisoner. His dress is different now.

Mr. Webster. I suppose, we may ask, what description of dress has been given to him.

The COURT. His belief arises from two sources. What he had from others is not evidence.

Cross-examined. Saw the prisoner when he was brought up to be arraigned. Saw him get out of the chaise at the door. Did not see him in this room. He had on a light coat—they were all pointed out to me, as they rode up. Don't know who pointed them out. Prisoner is the same person who got out from the chaise, and was pointed out to me, as Francis Knapp. Can't say whether I asked which was Frank Knapp. Heard some person, who stood by, say this is such an one, and this is such an one.

Peter E. Webster. April 6, about half past 9, went through Howard street on my way home. About a quarter of the way down street saw two persons walking about the middle of the street towards river. Took one of them to be Frank Knapp, and mentioned it once or twice. Have known Frank Knapp for a dozen years. When at home generally see him every day or two. Then took him to be Frank, and I have never altered my mind. The other person I did not notice. They were walking slowly. Capt. Knapp, the father, lives in Essex street, near my store. Prisoner stays at his father's, when at home.

Cross-examined. Did not see the face of the man. Knew him by his air and walk. Passed within six or eight feet. Did not

speak to him, nor he to me Both men had dark wrappers and glazed caps. Night was cloudy and a little damp. Don't know Richard or George Crowninshield. Thought they were waiting for somebody because they walked so slow. I sometimes takes five-franc pieces—not very common—take more or less every week.

John A. Southwick. Live in Brown street, next house but two to the west above rope walk. On the evening of the murder, I left my father's house in Essex street about half past 10 to go home; as I passed up by rope walk saw a young man sitting there; as I passed him he dropped his head. Stopped at Downing's door, then walked back. Dropped his head every time I passed him. Felt very sure it was Mr. Knapp. Passed him three times, when on the steps; he had a brown camblet cloak, and glazed cap. Was brought up along side of him, within a few houses of him, from his boyhood. When I passed the third time, went into my house; my wife was up. Came out and walked to the corner of Downing's house, looking for this person, down Howard street, when Capt. Bray came up. He asked what I was out there so late for. Told him I had seen a person on rope walk steps, and about there, that looked suspicious. He said he had seen one also, and said, there he is now, on the opposite side of the street, further up. Looked and saw a person standing there. He came down by us, and went to the post nearly opposite Capt. Bray's door, and leaned over the post. We walked down some ways, perhaps as far as Dr. Johnson's house. While

he was at the post we went in Bray's house. I stood back. Mr. Bray watched. In a short time he said, another one has come up. Now they have passed along to the west corner of the house, and that induced him to go to the window to look out. Saw one of the persons running across the street. Then Mr. Bray and I came out, went down Howard street, round up Williams street, and back home. We parted in front of Bray's house. Mentioned to my wife what I had seen. Told her I had seen a person that I supposed was Frank Knapp, without making any further observation. Do not recollect dress of person leaning on post.

Cross-examined. His dress was a camblet cloak. Judge it was Frank Knapp, from the general appearance of the man. He was not wrapped up, for I could see that he sat cross-legged. It was a cloudy night, but moon was at the full. I have no doubt that he had on a glazed cap; did not see any fur about the cap. I went out the second time from suspicions expressed in the house when I told what I had seen. They said in the house they should like to have me go out, though I said who I thought the man was. Have not known that Howard street is a place of assignations for the last six months. I cannot say that I suspected the man was there for that purpose. Had the same suspicions about the man who walked down the street that I had of the man on the steps. Don't recollect stating before the magistrate that I took the person on the steps for Frank K. from nothing but his dress. Cannot describe the dress

of the person who came up and joined the man standing at the post, when we were in Capt. Bray's chamber. Can't swear to the dress of either. My impression is that one of them had on a light coat. Can't recollect the other's dress. Don't recollect that I have told any person that I could not tell who the person was on the steps. Have no recollection of telling any person that I could not distinguish. I never said the man on the steps was Wm. Peirce, but compared him to Wm. Peirce in size and appearance. Was at Ipswich before the Grand Jury; did not state to them that I supposed the person that I saw on the steps was Frank K. Was sworn to tell the whole truth. I did not say that it was Selman or that it was not. Said I thought that it looked some like Selman.

Daniel Bray, Jr. Live in Brown street. On the evening of 6th of April was passing down Brown street; saw a man dressed in a dark, full frock coat, dark pantaloons and shining cap standing at a post. Saw another man looking or peeping down Howard street, who I found was Mr. John Southwick. Asked him what he was about there so late. He said that when he went into his house a man was sitting on the rope-walk steps. I turned around and observed, there stands the man now. Mr. Southwick said that he did not like the looks of the man when he went in. Walked on with him close to the rope walk, when the man passed along on the south side and took his station at the post next the bounds between my house and that of Mrs. Andrew. Asked Southwick to go with me

into my house, to see what he was about. We passed about 20 feet from him, entered my west door, and went up into my chamber. Looked out of the window and could see the man at the post, and never lost sight of him while he stood there, which was five or six minutes, when another man came from eastward—in the middle of the road and not on the sidewalk. He came up to the post close to the other without bowing, as near as he could get, and stopped. They then went into the street 10 or 11 feet toward the northwest and stood there not more than a foot apart, and not more than a minute. The man that came from the east had on light clothes. He then ran as hard as he could down Howard street. The other at the same time started off in the opposite direction, and was out of sight towards the east. When we got into the street we could see no one. We then went down Howard street immediately, and as soon as we came to the graveyard, we looked over the fence several times, but saw nothing. Don't know the prisoner now, but did know him four years ago. Have seen him since in prison, and at the bar. Believe he was one of those I saw that night. Had heard the clock strike 10, and should think that it was 30 or 40 minutes after when I met Southwick.

Cross-examined. Saw the man before I came to Southwick and it appeared singular that one should be standing there. He did not then tell me that it was Frank Knapp, but he has since told me. Since the last trial I have made up my mind it was the prisoner I saw.

Mrs. Southwick. On the night of the murder Mr. S. came home after 10, went out again and returned just before or just after 11.

Capt. Bray (recalled). My dress was a dark frock coat, dark pantaloons. Southwick's was reddish pantaloons, and we both wore hats.

Miss Elizabeth Potter. Live in Brown street. The evening of the night of the murder, about half past 10, saw a person standing at the corner of Howard street, looking down. He turned and looked towards the house, when I opened the door. The house is nearly opposite the rope walk. His dress was light pantaloons, cinnamon drab, and dark coat; don't recollect what he had on his head. Know Mr. Southwick and do not think it was he.

Isaac H. Frothingham. Was in Brown street the evening of 6th April, at Mr. James Potter's, nearly opposite the rope walk. It was about half past 10 when I came away. When I opened the door, saw a person walking up the street slowly. He turned and looked over, and remained there after I had walked up the south side of the street. He was on the opposite sidewalk, within a few paces of the rope walk. Looking back, thought he was joined by another person. One of them was dressed in a dark coat and light pantaloons and hat. The person who joined him must have come up Howard street or Brown street.

Cross-examined. My first impression was that it was Mr. Southwick, but afterwards came to a different conclusion, because he was too tall, and if it had

been Southwick, he would have spoken to me. Thought his pantaloons were of a cinnamon drab color.

Joseph Burns. Was born in old Spain; have lived here about 25 years. Keep horses to let, near the head of Brown street. Know Francis Knapp. Had a conversation with him in the stable, after the murder, and after the Committee of Vigilance was appointed. He came into the stable and asked if anybody was there besides me; whether I had any loft, or place upstairs; told him yes. He said, the best way is for us to go up, as I want to say something particular to you. We went up; then he asked me if I knew anything about Capt. White's murder. Told him, no—I wished to the Lord I should, because I would make it known pretty quick. He said the committee had heard I was out on the night of the murder till about 10 o'clock; and, said he, if you saw any one, any friend, out that night in the street, don't you let the committee know it, for they will try to pump something out of you. He said his brother Joseph was a friend of mine, and he himself too was a friend to me. Said the committee wanted to pump me, to see if they could catch me, in one thing or another. I said that I knew all the members of the committee, and if they wanted me any time, I was ready to answer them to any thing. Asked Knapp what he thought of the Crowninshields, who were in jail. Mr. Knapp said they were as innocent of that as he and I. I asked him who did it then? He said Capt. Stephen White must be the one. I said, don't you tell me such a

thing as that. I know Capt. Stephen White, and have known him ever since he was 18 or 19 years old. He put his hand under his waistcoat, where he had a dirk, and showed the handle. I said, d—n you, I don't care for you, nor twenty dirks. Said that he was a friend to me, and had come to give me this information that I need not get into difficulty. Know Joseph J. Knapp, Jr., he used to come to my stable to hire and to put up horses. He was there on the week before the murder. He sometimes wore a cap, and sometimes a hat. He usually left one of them there. He wore also a cloak, or surtout, and likewise left one or the other of these.

Nathaniel Kinsman. Reside in Brown street. A few days after the murder, I went out to see from what part of that street I could distinguish the window in the chamber of Capt. White. I could see the window from the southeast corner of Mr. Downing's house, at the corner of Howard and Brown streets. I could see the north window of Capt. White's sleeping chamber, and that of the chamber above. I have no doubt that I might have seen the windows in the chamber of Mrs. Beckford, but my object then was to ascertain whether I could see the window in Capt. White's chamber. There is no building to interfere with the range of the second story. Could see the windows very plain, without getting upon the steps of Downing's house.

Philip Case. Early after the murder of Capt. White, heard of a suspicious man's having been seen on Rope Walk steps. Thought he might be watching;

went to see if anything could be seen from steps. A little to the west from the opening of Howard street, I could see Capt. White's chamber window. On Downing's steps could see it very plain.

Mary Jane Weller. Know George Crowninshield. About three weeks before the murder, he was at my house. In the morning went into his room where he slept. Mary Bassett and I found a dagger under the pillow of Mary's bed. He had been sleeping with Mary that night. Asked George why he carried a dirk. He said it was because it once saved his life, and some Salem fellows were going to flog some Danvers fellows. On the evening of April 6, between 10 and 11 o'clock, he came to my house. Saw him there next morning. Went out and heard of the murder. Then went into George's room and told him. He appeared to be alarmed, and Mary was alarmed. Wanted to go down to Capt. White's house to see the body, and asked Mary to go. George was unwilling to have her go. He told me that morning not to say anything about that dirk; he said every scrape was laid to the Crowninshields. He stayed there all day, and did not go away until the evening. He has been accustomed to come there at dark, and to go away again, and come back between 12 and 1. He had stayed there once all day, a very cold day. This time, he said he had a bad headache, and laid abed nearly all day. He asked if we went down not to say anything about his being there, and not to say anything about the dirk. Went away about dark, day af-

ter the murder. The dirk was about as long as a case knife; it had an ivory or bone handle.

S. C. Phillips. Cannot recollect, that I ever received five-franc pieces; they are sold as merchandise; not much used as a currency. They go by tale. Am a merchant; the usual currency is bills or checks.

Henry R. Deland. Was at the house of Capt. White, on the day after the murder, after the body was laid out. I saw the key of the chamber on the sofa. We looked for it to fasten the door. Miss Kimball was there. Called at Capt. White's house, on the day before the murder, between half past 12 and 1. Lydia Kimball came to the door.

Gideon Barstow. Went with Mr. Colman, on 29th May, at his request, to the meeting house in Howard street. Mr. Colman went to the further steps of the house, put his hand under the step, and drew out the bludgeon, and said this killed Capt. White. Five-franc pieces form a small portion of our currency. Do not recollect receiving but one. They are considered as merchandise, and generally pass at a discount.

Jedediah H. Lathrop. I live in Beverly on the farm owned by Capt. White. He was there on the day before he was murdered. His young man came with him. It was after dinner. He returned home about 5 o'clock. The next time before that, he was there on Friday, April 2. He came up in his wagon. He then came up after dinner.

Jonathan Very. I live with Mr. Osborn and have the care of his stable. I know Francis Knapp very well. One time Francis came to me, and asked

me if I would bring him a horse and chaise behind, or near the court house. Brought the horse and chaise, between the court house and Mr. Chase's. Nobody got in with him. Do not know which way he went. He asked me to harness Nip Cat, in the chaise, and bring him as soon as I could.

William E. Hacker. Made an agreement with Mr. Wm. Osborn for the sale of oats on 2d April last; he commenced taking them away immediately. Took the last of them on April 6.

John W. Treadwell. Am cashier of the Merchants' Bank. Five-franc pieces are not a common coin—rather an article of merchandise. They are a favorite bank coin, and we generally keep them in the vaults, till we can get a premium upon them. Mrs. Beckford was a niece of Capt. White's, an only sister's daughter, and housekeeper in his family. She had two daughters, one married to Joseph J. Knapp, Jr., the other to Mr. Davis of Wenham. Capt. W. had nephews and nieces, children of his late brother Henry. Mr. Stephen W. and family were at Boston last winter at Tremont House.

Cross-examined. Am one of the Committee of Vigilance. The committee consulted Mr. Choate as counsel. They did think proper to take an oath not to divulge their proceedings. I do not know how the expenses of the committee were paid. A letter was received from Mr. Stephen W. offering them \$1,000—to pay expenses—if their investigations should not lead to the detection of the murderers.

J. C. R. Palmer (recalled). As

to prisoner's visit to the Crown-inshields on 9th April, George asked me if I had heard of the murder, and said they had no hand in it. Richard afterwards asked me if I had heard of the music in Salem. He said people supposed they had some hand in it—they said they should leave home. Told him I thought it a bad plan if they were suspected. George told me he took his dirk down to the machine shop and melted it down; for a committee was appointed to examine houses, and it would be a bad sign to have it found. Richard agreed to meet me at Lowell on 1st May. He gave me \$5 bill on Newburyport Bank.

Cross-examined. Never have stated that the murder was committed with a hatchet; I said I found a hatchet in the machine shop; put it away so that it might be found if called for. It had the handle newly sawed off and had clay on the head of it, but was just like any other hatchet.

David Starrett. Live in Wenham and keep a store there. I heard of the robbery of the Knapps last spring. There was nothing done to detect the robbers. I saw the prisoner at my store on the afternoon before the murder, about 4 o'clock. My store is about one-quarter of a mile from Jos. Knapp's house.

Abraham True. Live in Williams street; pass through Brown street several times every day. The back windows of the two upper stories are perfectly visible from Brown street when the trees are not covered with leaves. Am a retail grocer; do not take a dozen five-franc pieces in a year.

A majority of The COURT having decided that the confession of the prisoner could not be given to the jury, *Mr. Webster* submitted to the Court an application on behalf of the Government for a re-argument of the question.

The COURT were clearly of opinion that it would be proper to hear an argument, not being unanimous in the opinion already expressed.

The *Counsel for the Government* contended, that the confessions of the prisoner were proper evidence to be submitted to the jury, on several grounds. 1. The assent to J.'s confession, which was asked of the prisoner, was not such a confession as comes within the protection of the principle of law. 2. What was said by Phippen Knapp to the prisoner, even if said with a view to draw out a confession, is not such a threat, or promise, or encouragement as the law requires. 3. The hope of favor, whatever it was, was addressed exclusively to obtaining his assent, to J. J. Knapp's disclosure, and had no application expressed or implied to facts within his own knowledge.

The *Counsel for the Prisoner* confined themselves chiefly to a reply to the arguments urged by the Counsel for the Government, contending that 1. The prisoner was given to understand that his brother's confession was to be made only on condition of his assent; and if he assented, then he would have a hope of pardon. 2. Consenting that his brother should confess was virtually his own confession. 3. If therefore any improper inducement was held out to him to consent, not one word of any subsequent confession can be evidence.

The COURT adhered to their former opinions.*

Mr. Webster stated to the Court—that the question appeared to be not fully settled, and proposed to call the witness and ask him certain questions of a different character from those already proposed to him. He proposed to ask the witness whether the prisoner did assent to J's confession, suggesting that it would probably appear that he never did assent.

WILDE J. That would materially vary the case.

MORTON J. It would be most important evidence. My opinion was founded on the supposition that he assented.

Mr. Dexter. It seems to me that the time is passed when the witness can be called. He was asked to state all the conversation that related to encouragement and he said he had done so. To call him now would be a measure of severity to which the prisoner ought not to be subjected.

WILDE J. It is much to be regretted that the question now proposed to be put had not been asked. Both Judges founded their opinion upon the supposition that the prisoner's assent was given. If such were not the fact, if the encouragement did not produce its effect, we see no reason why his subsequent confessions should not be admitted. The counsel could have no intention in pursuing this course. Feeling a great degree of confidence in the admissi-

* See *Com. v. Knapp*, 9 Pick. 496.

bility of the evidence, as the facts stood, it probably escaped attention. This course may be an inconvenience; but we are all of opinion that we ought to hear the witness, to ascertain if there is any important fact not before the Court.

Mr. Colman (recalled).

WILDE J. It becomes necessary to ask one question which was not proposed to you before. The fact the Court wish to ascertain is, whether, before the confession, there was any assent to the proposition made to the prisoner by his brother Phippen Knapp?

Mr. Colman. There was neither assent nor refusal.

MORTON J. The fact, upon which my whole opinion turned, that is, the prisoner's assent to his brother's confession, is varied. It is now said that there was no assent. The burden of proof is upon the prisoner to show that the case is within the exception to the general rule. As the evidence now stands, it does not appear that there was any improper influence. There is no evidence of assent.

Mr. Colman. Had been informed that the murder was committed at a very early hour in the evening—thought it incredible, and asked the prisoner at what time it was done. He told me between 10 and 11. Had been incredulous about there having been but one person in the house. He told me, that Richard Crowninshield alone was in the house. Asked him if he was at home that night. He said he went home afterwards. Asked him, in regard to the weapon—the place where it was concealed. He told me under the steps, and said that if I went there, I should find it. I asked what became of the dagger or daggers.—I am not certain which. He replied that it or they had been worked up at the factory.

Cross-examined. The principal part of the conversation was between Phippen and Frank. Friday afternoon 28th of May, I first visited him—had never spoken to him before. Went immediately from the cell of Joseph to that of Frank. Phippen was not in Joseph's cell with me. While I was in the latter, some

one knocked at the door.—Looked out at the scuttle of the door and saw Phippen—he asked to come in. I told him 'not yet.' I had not finished my business with his brother; was at Joseph's cell 3 times on that day, and again on the day following—once with Dr. Barstow, and Stephen C. Phillips. Frank was told that Joseph had decided, etc. (as before,) and nothing more. Did not hear it stated, that Joseph had made a full confession; never said that I would not mention, what Joseph had told me unless Frank consented to the disclosure; never stated to Frank that there was no chance, if both refused to confess; never told him that there was evidence enough to hang both. He never stated, that he had no confession to make; already knew that the club was under the church steps, but which steps I did not know, until Frank told me; don't recollect telling the prisoner that Palmer was arrested, or that application was made for his pardon; don't recollect that it was stated to Frank that Palmer would receive a pardon, though

I think it not improbable, that it was stated. The jailer had called and told us that it was time to go, and repeated his call; then Phippen appealed to me, and Frank said, "I suppose you will use your influence;" I said, this is your deliberate assent (to Joseph's disclosure,) he said, 'I don't see that it is left for me to choose. I must consent.' Have stated all that I so well recollect, as to be willing to state under oath; think I stated to Mr. Stephen White in Boston, at the Tremont House, and also at the office of Phippen Knapp, when Mr. Dexter was present, that Frank had confirmed Joe's confession.

Phippen Knapp was present during the whole interview and

might have heard it; didn't tell Mr. Stephen White that Frank had told me where the club was. I have no recollection of telling anyone where it was, till I had found it, except that I spoke of it to Phippen Knapp as we came up from the jail; told him that I should rely upon his honor that he should not go for the club. I went to Frank's cell at the request of Phippen Knapp—his conduct was an example of filial and fraternal affection. At the request of Joseph, when I went out of his cell, I asked his father and brother Phippen to go to him. Frank did not tell me that he knew where the club was, of his own knowledge, or that anyone told him it was there. He answered the question directly.

MR. GARDINER'S OPENING, FOR THE PRISONER.

Mr. Gardiner referred to his situation as being peculiarly embarrassing. His connection with the prisoner had been but of a few days, and he had been, perhaps unfortunately for the prisoner, substituted for another gentlemen, who was fully competent to do justice to his cause, by reason of his intimacy with the friends of the prisoner, and his familiarity with the neighborhood of the place where the murder was committed. He readily assented to the truth of the remark of the Attorney General, that this murder was most atrocious. He thought that the man must be very bold who would deny it. But he cautioned the jury not to let the enormity of the crime and the general alarm which it excited, prevent a full and free exercise of their judgment. He urged them to remember, that the presumptions should be rather for, than against, the prisoner, particularly under the peculiar circumstances in which he was placed. He was a young man, about 19 years of age, brought up in the bosom of this peaceful community, and now, for the first time, placed at the bar of his country, and to be tried for his life. The whole community was in a state of the

greatest excitement, and ready to fix its suspicions upon any individual who might be singled out. The Attorney General has informed you that even the honorable relation of the deceased did not escape suspicion. Reports, the most unfounded, the most calumnious, have been set in circulation against even him. Large rewards were offered by the State, the town, and the family of the deceased, for the detection of the murderers, and a most extraordinary tribunal was formed, under the name of a Committee of Vigilance, consisting of twenty-seven persons, and these selected from the most respectable portion of the community, holding their nightly sessions in secret, and despatching their agents through the State, and beyond the State. He likewise referred to the manner in which the prosecution had been conducted. It was backed, he said, by nearly all the talents of the bar of the county. Even the Legislature has been stirred in this matter. A special law has been passed for the very purpose of this trial. Justice was thought to move with too slow a pace. Both the Attorney and Solicitor General were directed to attend. But they were thought not enough, for besides all the bar of this county, there was brought into the cause a gentleman, whom he considered as the most eloquent orator in his age and country. He came fresh from his victory at the South, with his brows wreathed with the laurels he had won in the Senate Chamber, to overpower the jury with his eloquence, and to "nullify" the prisoner's defense.

Mr. Gardiner again alluded to the deep and general sensation, produced by this atrocious murder, particularly on account of the age and station in society of the victim of the assassination, but it was the right of the prisoner to ask, that the law should keep the even tenor of its way, whatever be the station of the party.

He called the attention of the jury to the state into which the public mind had been thrown by the publication of the confession of one of the persons implicated. So determined seemed to be the community to establish the guilt of the persons accused, that he might almost say it was hazardous for

him to appear in the defense. The cry of the people is for blood. He considered it truly an alarming state of things, if to be accused was to be convicted, if rumors, generated by suspicion, were to be the evidence upon which the life of the prisoner was to be put in jeopardy. But he had no fear on this account. He did not despair of a fair trial, even in this case. He recollected other periods of violent excitement, when the law interposed her shield to protect the accused against the influence of popular feeling. He referred to the cases of Selfridge's acquittal,^b and to the trial of the British soldiers, who were concerned in the Boston massacre.^c

He then alluded to the strong biases which might be supposed to have some influence upon the minds of the most honest witnesses in this case. There is a danger in human testimony, in human judgment. Witnesses testify under mere impressions. It is almost impossible that the imagination should not, in some degree, aid in filling up the outlines of fact. These considerations should be felt by the jury, in bringing their minds to the weighing of the testimony in this case. The prisoner's awful situation required the jury to divest themselves of all prejudices, and to shut out from their minds everything concerning the cause, which they had not heard from the witnesses in the court room. It was their duty to try the cause, precisely as if they had never before heard of the murder, and if in coming to a result, they should be in the least degree influenced by out-door impressions, they would violate their oaths. The evidence brought against the prisoner should be conclusive. The Government is bound to prove, beyond all doubt, that the prisoner is guilty in manner and form, in which they have charged him.

He then distinguished the several classes of offenders connected with the crime of murder. First, he who strikes the blow, being the principal in the first degree. Second, he who is aiding and abetting, being the principal in the second degree. Third, he who hires and procures, and is considered the

^b See 2 Am. St. Tr., 544.

^c See 9 Am. St. Tr.

accessory before the fact. All these are subjected to the same punishment. How was the prisoner charged in the indictment? First, as the person who struck the blow—next as being present, aiding and abetting the person who struck the blow. This person, in some of the counts, is alleged to be Richard Crowninshield, Jr., in others a person unknown. This is the distinction of the Common Law. He who is a principal in the second degree, in England, is, under the statute, an accessory before the fact. The Government was bound to prove that the prisoner gave the blow, or was present, aiding and abetting the murderer. He thought the real inquiry was, whether the prisoner was there, aiding and abetting the murderer. The evidence which the Government had produced is of a very weak nature, and is liable to great error. They first attempt to prove a conspiracy; then, in support of that, they show you that the murder was committed—that three men were in the vicinity of the place of the murder at the time it was committed. They also show a combination of a great number of facts. But all these avail nothing, unless they bring you irresistibly to the conclusion that the prisoner gave the blow, or was present, aiding and abetting the murderer. These circumstances are so connected together in this conspiracy, if the Jury should come to the conclusion that one is untrue, the whole case must fall to the ground.

The whole evidence of the conspiracy rests on two conversations. One, overheard by Leighton, between the prisoner and his brother, at Wenham, the other heard by Palmer, between the Crowninshields. So far as these conversations tend to anything, it is to disprove the charge. As to the weight of this testimony, we intend to show that these witnesses were not entitled to credit. The Government having proved a conspiracy, they prove the murder, and ask you to infer that it was done in pursuance of a conspiracy. Their whole evidence, if it proves anything, shows the prisoner to have been an accessory before the fact. The circumstances of the club and dirk might have been communicated by others to the prisoner. All the other circumstances in the case afford no presumption that he was aiding and abetting.

The only question is, was John Francis Knapp constructively present? Even if he were in Brown street, he was not present, except by a mere fiction of law. To make a man liable as constructively present, he must be in a capacity to render assistance, and must be there for that purpose, and must actually assist. To show that the man in Brown street could not be considered in law, as present, he referred to some cases in the books, relating to the subjects of constructive presence. He stated that no person, knowing a felony, can be said to be present at the commitment of felony, unless he be where he can aid, with the intent and ability concurring, and is actually aiding at the fact. In this, as in other questions of law that have arisen, there is not so much difficulty in ascertaining the principle as in applying it. The whole tendency of modern cases on this subject has been to narrow the principle.

Mr. Gardiner said the defense proposed to introduce evidence to show that the man seen in Brown street was not the prisoner at the bar, but some other person; that the prisoner was in a different place during the evening; and that Brown street was not a situation in which aid and assistance could be given to the murderer.

Mr. Dexter stated that there was one question which he wished to present to the Court, and that was whether principals in the second degree at the common law were not made accessories before the fact, by our Statute of 1784, c. 65, and entitled to all the privileged of accessories before the fact, in the form and time of trial. This Statute is entitled "An Act against accessories to crimes and felonious assaulters," and describes principals in the second degree at the common law, and declares that they shall be considered as accessories before the fact. He cited Statute 1804, c. 123. This statute is not repealed by the general repealing Act of 1805, c. 88. And the law does not favor repeals by implication.

The Act of 1804, above cited, is consistent with that of 1784; and the law does not favor repeals by implication.

The *Attorney General* and *Mr. Webster* said the Statute of 1784 was virtually repealed by the Statute of 1804, and that if it were not, the description of accessories before the fact, in that Statute, was not the common law definition of a principal in the second degree. The words "being present" are not used in that statute. 6 Dane, 588-9. The Act of 1784, c. 65, means being absent. As the law stood when the Act was passed, a man who should hire, procure, abet or assist, was an accessory. A man who should abet, etc., "being present," was a principal in the second degree.

THE WITNESSES FOR THE PRISONER.

J. P. Saunders. The distance from Brown street to Essex street, through the garden of Capt. White, is about 295 feet. I have no affidavit, made by J. C. R. Palmer, before me. I saw it last in the possession of Palmer. He had it when I left his cell. It was sworn to before me.

Daniel Bray. I have stated that when I first saw the second man, he was in the middle of the street. I have not examined to see which way he could have come. If he had come from the north side of the arched gate of the Common, I could have seen where he came from, but not if he came from the south side. I could have seen him 15 feet farther south than I did.

Nehemiah Brown. I was in Palmer's cell when he was sworn to a paper; don't know what became of it, but think that it was left with him.

Joseph Burns. Frank Knapp's dirk had a plated handle, which looked like silver; am not certain whether or not it had a guard. It had a cross piece on the handle. It was not drawn.

Wm. H. Allen. I have known Frank Knapp from childhood, and have been intimate with him. Can't say whether he had a dirk before the Wenham robbery. The first time I saw it was about the time that dirks were selling in Salem; have no dirk, myself, but I have known a few young men who have had them—this was some time after the murder. (Identified the dirk shown.) This was Frank's. Mr. Newhall made it for him.

William Babb. Keep the "Half-way House," between Boston and Salem. Palmer was at my house; my impression is, that he came there on the 9th of April, and went away on the morning of the 10th; heard of the murder on the 7th, in the after part of the day, I think. He never slept there at any other time. Palmer called himself George Crowninshield, and left with me a plaid silk handkerchief, marked with that name, and offered me a note for the amount of his bill, signed George Crowninshield, and said that he should be along in a day or two, and would pay the bill; asked him if his name was George Crowninshield—he kept his head down very much, and I said, "you don't resemble the family; I know Richard very well—but you may be a younger brother." He said "it might be the case."

Thomas P. Vose. Live in Thomastown, and am commissary of the State Prison; know Palmer; he was sometime in the prison.

James W. Webster. Live in Belfast, Me.; have known Palmer these eight years; have always heard a bad character of him; have heard perhaps an hundred people say, that he would not be believed at all, in any case in which he was interested. His general character is not good.

William F. Angier. Live at Belfast and was admitted to the practice of the law about a week ago; have known Palmer eight or nine years; have never heard his general character for truth and veracity questioned.

The Counsel for the Prisoner proposed to ask the witness if he would believe Palmer under oath?

The COURT said that was not a proper question. They then proposed to ask, what was the public opinion about him as to other crimes. This question, the COURT said, could not be put.

They then proposed to ask whether he was not a common liar? This question was ruled to be inadmissible.

They proposed to inquire if it was not the general belief that he had been guilty of perjury?

This question was not admitted.

They proposed to ask, if his general reputation was not such that he would not be believed on oath?

The COURT held it not to be a proper question.

Benjamin Leighton. Frank's dirk had a gilt handle, with a little jog to prevent its going into the scabbard. The one produced looks like it.

Dudley S. Newhall. Dirk shown him. Was making this when prisoner came into my shop and wished to purchase it; I sold it to him on the day before the Wenham robbery. I was making it for my own amusement. It was several days before it was delivered, that he said he should like to buy it. This is not my regular business—I am a jeweler. There was a particular demand for dirks at that time.

William Peirce. My usual dress at the time of the murder was similar to prisoner's. It was a plaid cloak and a black glazed cap. This was a common dress. Almost all the young men wore glazed caps. Before the murder, it was not usual to wear dirks. Since that time many use sword canes, but I don't know as to dirks.

Cross-examined. I was not on the Rope Walk steps on the night of the murder, but I was in Brown street, for I live there; don't know what time—I did not stand leaning over a post.

Asa Wiggin. Am a tailor.

Camblet cloaks were the most common last winter. From the 1st of September to April, I made 24. I did not make any plaid cloaks last winter; made as many mandarins as I did cloaks.

Israel Ward, Jr. Am a tailor, and made about 50 cloaks last winter. Two thirds of this number of blue and brown imitation camblet—the other third principally of German camblet.

Cross-examined. Have made clothes for the prisoner, and between the 20th and last of January made him a frock coat, of olive or dark brown color, single breasted, snug about the body, and quite full in the skirts.

Stephen Osborn. Am a hatter, and live in Salem. Within the last year have sold 1,600 or 1,700 head coverings—more than 500 caps, of all kinds, within the year ending about three weeks since; and of glazed and leather caps, 200 in all. Know the cap produced, and sold one like it to the prisoner, as much like it as two articles can be; have sold 200 of the same general appearance as this, men's and boys. There are other hatters in this town. It was a common article of dress last winter.

The Counsel for the Prisoner here read copies of two warrants against J. C. R. Palmer, one dated the 8th of June, by which he was arrested and committed for further examination, upon the same charge as that against the prisoner; and one of July 10, by which he was committed by the magistrate to answer to the same charge, at the present term of this court.

They then read a copy of a record of the Court of Common Pleas of Maine, of a conviction of Palmer for breaking a shop, with intent to steal—the judgment and sentence, which was confinement to hard labor for two years, in Thomastown State Prison.

Alfred Welles. Reside in Boston, and import hardware and fancy goods; have sold small arms, such as pocket pistols and small dirks, in greater quantities within two months than usual. Have had orders from Salem for quantities. After the murder I received orders for short dirks from respectable persons here and in Boston, as long as I had any left.

Major Petty. Live in Danvers, about a quarter of a mile from Crowninshield's; remember being at work for George Crowninshield, trimming a couple of trees; can't tell whether before or after the murder. While at work, Richard and two young men, whom I didn't know, came up to us, I heard the name of one

called Allen. I can't say whether the prisoner at the bar was one of them—one was a man about his size, and one of them had a whip, but don't know how they came. I can't say whether Mr. Allen was the man.

Ebenezer Shillaber. Have had a conversation with Mr. Southwick respecting the man in Brown street. He told me he recollected seeing a young man there; that he went into Bray's house with him, and that after having got there they saw another join the first. Mr. Southwick said that he could not see so well as Bray could, he said that he thought that the man who came from Newbury street was taller than the man who was in Brown street.

Mr. Webster objects to asking what Southwick said except in contradiction of what he has stated on the stand.

WILDE, J. I never knew the rule restricted. What the witness said is to be given at length, and then if any facts differ it will appear.

Mr. Webster. It must appear that he has stated something inconsistent with what he stated on the stand.

Mr. Dexter. Southwick stated that the man on the steps was Frank Knapp. The height of Richard Crowninshield may be shown.

PUTNAM, J. The question should be asked generally. You cannot ask as to any point, to which he has not been inquired of. *Non constat* that if asked, he would not have given the same account that he has now given on the stand. He ought to have an opportunity of giving his account, before you discredit him.

Mr. Gardiner. We propose to ask the witness, generally, what description Mr. Southwick gave to the witness, of the persons whom he saw in Brown street.

PUTNAM, J. The witness may retire, if the Counsel for the prisoner desire to ask Mr. Southwick. If Mr. Southwick has given different reasons for his belief, as to the identity of the persons in Brown street, than what he has given in court, the fact may be shown.

Mr. Shillaber. Don't recollect whether Mr. Southwick gave me any description of the persons whom he saw in Brown street; asked him whether, for aught he knew the person who came from Newbury street might not have been Francis Knapp, and the person in Brown street Richard Crowninshield? He said he could not tell, but for aught he knew, it might be so; had no conversation with him about the man on the steps; my only object was to satisfy myself, that it might have been Richard Crowninshield in Brown street.

Cross-examined. Was counsel for Richard and George Crowninshield, when I made the inquiry.

Mrs. Burns. On the night of the murder of Mr. White, saw Selman and Chase at my house. They tied their horse in the yard, and went away. Mr. Burns was not at home; Chase came back again about half past 9—stopped about five minutes for Selman, then took his chaise and went away; Selman came back about five minutes after Chase had gone, and asked for him; a young man was with Selman, at the bottom of the yard; did not know who it was.

Selman said he expected Chase to call for him there; he went away, and returned in about a quarter of an hour, to see if Chase had called for him; the last time they were there, the

young man that was with him left a message to tell Chase, when he should come, that he should be at Pendergrass's.

Mr. Webster objects to this evidence, as the declaration of a party.

PUTNAM, J. The object of the evidence is to account for George Crowninshield during that evening. Supposing this young man was he, the Court think this is a reasonable mode of proving that he was at a particular place, by showing that he agreed to be there, and then showing that he was there.

John Needham. Saw George Crowninshield, on the night of the murder, in South Fields, the first time about 7 o'clock, at the News Room, at Pendergrass's. Richard Crowninshield paid the rent for that room. Chase, and a young man, introduced to me as Col. Selman, came in, and George a few minutes after; they stayed there about half or three quarters of an hour, and then went away, all together; saw them again there between 9 and 10 o'clock; Chase then came alone in a chaise, and George Crowninshield and Selman came on foot afterwards; George was there all the time, except about ten minutes, that I was out.

Cross-examined. At this Reading Room we took many papers, and its general use was for reading; Richard Crowninshield paid for the papers; we had some

from Alabama, and the "Truth Teller," from New York. Sometimes we had gambling of all kinds; I should have played, if I had the means. Was employed to make the fire, keep the key, and light the lamps; Richard Crowninshield paid me, but no particular sum; when I needed a little change, he gave it to me. There is a game called props; I have never seen any other played; ours was not a gambling house; a gambling house is a cheating house. There was some liquor kept there sometimes.

Matthew Newport. Keep a victualling cellar at the corner of Union and Derby streets. George Crowninshield and Benjamin Selman came there on the night of the murder, between 8 and 9 o'clock, and stopped about 10 or 15 minutes; they inquired if John McGlue had been there.

Joseph Fairfield. Live in Danvers and keep a public house; saw George on the evening of the 6th of April about 9 o'clock with Chase and Selman at my house; they stopped there about 10 or 15 minutes, came in and took something to drink, two glasses of brandy and one glass of gin; they came and went in a chaise towards Salem.

William Austin. Saw George Crowninshield on the night of the murder at Pendergrass's about half past 9; he stopped in Pendergrass's shop a little while, then went into his room; I was there with him; when he went away he went towards Marblehead; he came out with me and John Needham.

Benjamin Selman. Saw George Crowninshield on the night of the murder; came over to Salem from Marblehead with

Mr. Chase; we went up to the factory and saw George Crowninshield between 5 and 6 o'clock; George wanted to go to Salem to see John McGlue, to get some money; he went with us in the chaise; we went to Pendergrass's and stopped near an hour; we got there about half past 7, and stayed till after 8; we then came over into Salem, and went to the Franklin building on the common, and Chase found a friend there—a female—and went away with her; George went down to Newport's cellar, and stayed there near an hour; said he wanted to see Mr. McGlue, who owed him some money; 'twas 9 o'clock when we came away; we went to Burns' shed and found the chaise was gone; I knocked at the door and asked Mrs. Burns if Mr. Chase had been there; she said he had been gone 15 minutes; went up into Essex street in front of the Coffee House when the clock struck 10; George then went over the bridge, while I went and told Mrs. Burns that I was going over the bridge; if Chase called, to tell him George was with me.

When I got there, Chase was there with a chaise, and said he had been waiting half an hour for me; stayed till a quarter after 10; then took our chaise and went home to Marblehead; we left George Crowninshield in the yard and got home 5 or 10 minutes before the clock struck 11; it is four and a half miles from Salem to Marblehead; have been in jail 85 days on suspicion of having been concerned in the murder; had on a hat and Chase had a glazed leather cap.

Clark Read. Live in Williams street; Mr. Selman came to my

house just after 9 o'clock on the evening of the 6th; I went down to the door with him and saw a person who spoke to me, and who I thought was Chase.

Mr. Dexter. Do you know what has been testified in this case?

I have been told as to one point, as to finding the club; I have heard something that Mr. Colman has testified, but only casually in the street, and this was confirmed by Mr. Dexter; the person who told me in the street was, I believe, Mr. Miller; I can't remember that any other person has told me; Mr. Dexter has told me that Mr. Colman had stated that it was by the prisoner's direction that the club was found.

Mr. Dexter, sworn at his own request. After Mr. Colman had been examined, as I went downstairs, the witness met me and asked me if Mr. Colman had said that he found the club by the prisoner's direction; I answered immediately that he did.

N. P. Knapp. I heard nothing else—not a word.

Mrs. Sally Needham. John Needham is my son, he came home on the night of the murder about 15 minutes before 11.

N. P. Knapp. I went to the prison with Mr. Colman, and to my brother Jo's cell; when we came out from there, went to my Brother Frank's (the prisoner's) cell; as I was going in, I observed that Mr. Colman looked anxious to be admitted, and I asked him if he would go in; he said yes, and came in; I addressed him in this way: Mr. Colman says that the Committee have evidence enough to convict you and your brother, that the

only chance of salvation is for you to confess; that Palmer has applied for a pardon, on condition of being a witness, and that a promise of pardon has been despatched to him from the officers of Government; that the messenger would pass through town that evening in the mail stage, and that if they did not confess before the mail stage passed through, it would be too late; that if either of them would confess, the Committee would stop that message, and apply for a pardon in favor of him, whichever it might be. I told him, also, that the sub-committee had severally assured my father that Palmer knew every circumstance relating to that transaction, and that the only chance to save his sons was to induce them to confess; then asked Mr. Colman if what I had related as coming from him was not true? He said yes, and then went on to state, "I have seen your brother, (addressing prisoner). I have made him these assurances, and offered him a pardon in case he would be willing to confess; I also assured him that if he committed anything to me in confidence, it never should be revealed, unless he should choose to become a witness; I am authorized by the Committee to offer this pardon to either of you." I then said: "Mr. Colman thinks Jos. had better confess, for if you should be convicted after his confession, you would have a greater chance of pardon than he would." I applied to Mr. Colman, and asked him if he did not think so. He said, "yes, undoubtedly; your youth will be very much in your favor; your case will excite great

sympathy, especially if it shall appear that you were persuaded to do what you did by your elder brother." He then said, "but I don't insist on the proference, I leave that for you to settle between you." My brother hesitated, and said nothing. Mr. Colman then said, "you know the condition, if you stand a trial, you will both be inevitably convicted; if either of you chooses to confess, he will save himself. If Jos. confesses, and you should be convicted, you will have a good chance of pardon, but if Jos. should be convicted on your confession, his chance would not be so good; at all events, your chance will be much greater than if you stood a trial, and were convicted on Palmer's testimony." He then reminded him that he had but a few moments to choose. My brother then said, "I have nothing to confess; it is a hard case; but if it is as you say, Jos. may confess if he pleases; I shall stand trial." I recollect nothing more than that; nothing was said about the club in Frank's cell, in my presence and hearing; this conversation in prisoner's cell was on Friday evening, after the arrest on the 28th of May. Mr. Colman stated to me that he had been at Jo's cell that day two or three times. Nothing was said in my presence or hearing about the time when the murder was committed. After he had been into Jo's cell, before his third visit, Mr. Colman said he made those visits, by request of the Committee, not by request of me, or any of my friends, but against our wishes. I next saw Mr. Colman on Saturday forenoon, near 10 o'clock, this side of the Halfway House;

got into Mr. Colman's chaise; he then told me he had seen the Attorney General, and showed me a promise of pardon, or of a *nolle prosequi*, if confession should be made, to either of the prisoners, excepting one who was named Richard Crowninshield, Jr. He asked me to turn back and go down to Salem with him, said he was going to see my brother Joseph; told him I could not go back then, and asked him not to go to see my brother without me; he said he would not go without me; he said he would wait till I returned; he then said: "I am not sure I got that story of the club from Joseph or Frank, but I believe from Joseph." Told him he did not get it from Frank, for he said nothing about it; he then said he did not know but that he had been misunderstood about this by Mr. S. White, and asked me to take a note to him, to correct the impression. I took the note, went to Boston, went to the Senate chamber, and did not see Mr. White; returned to Salem, and think I gave it back to Mr. C.; arrived in town about 3 o'clock, and went to the door of my brother Joseph's cell, and requested admission of Mr. Colman, who was in the cell at the time; he refused, and said I could not come in; Mr. Brown (the jailor) allowed me to ask the question, though he would not admit me. Mr. Colman said: "You cannot come in, I have not finished my business," or something to that effect; he said he would meet me at my office as soon as he had done; he came to my office, bringing with him a paper, about 5 o'clock—it may have been a little before or a

little after—this was Saturday; asked him to show me what he had in his paper; he said he would not, except in presence of witnesses; met Mr. Colman the Monday following, in Central street, in a chaise; he stopped his chaise, and beckoned to me to come to him; I went. He said, "you make yourself easy on the subject we were conversing about last; have seen Mr. Stephen White, and have not been misunderstood." The next was at my office, three or four weeks after; a week after the death of Richard Crowninshield; I believe it was the 20th of June. Mr. Dexter was not present when the conversation began. Mr. Colman said, "I have called on you, Mr. Knapp, to refresh my recollection of the interview with your brothers; I may be called as a witness, and I wish to state the conversation accurately." After some observations, I don't recollect what, he alluded to the club; I denied that my brother said anything about it. He said, "Well, you will probably be a witness, and will have an opportunity of giving your account of it."

Cross-examined. When I went to the prisoner's cell with Mr. Colman, I went from my brother Joseph's cell; we went to Joseph's cell together, to make the statements to Joseph, that the Committee had made to Mr. Colman, to see whether he would confess; this was on Friday evening, between 6 and 7 o'clock; I had not been to the cell of either brother before; we both went into Joseph's cell, and a conversation was had about confessing; don't know whether Joseph agreed to become a witness for the State.

It was not positively agreed that he was to become a witness for the State; it was agreed on certain conditions; the conditions were, that he should have the preference; his brother chose that he should; I understood that Joseph's becoming State's witness depended upon Frank's consent. There was no agreement about the time or place to see Mr. Colman, and report Frank's answer. If Frank consented. I don't know that I was to do anything; I went to see what he had to say about it; don't recollect what I was to do if he assented; don't know that I was to report to Mr. Colman. During this time, we had the conversation concerning the club. There was an understanding that Joseph should turn State's evidence, but if Frank did not assent, it should be offered to him; Joseph would not accept that offer unless Frank would assent; I understand he was determined not to assent to Mr. Colman's proposition unless Frank were willing; don't recollect how it was arranged that Mr. Colman should find that out.

When Mr. Colman told me not to get the club, was in front of the door of Joseph's cell; I heard nothing said about the daggers, in Frank's cell; do not recollect hearing anything said about its being a hard thing that Joseph should "have the privilege to confess, since the thing was done for his benefit." Frank said it was a hard case, a hard alternative. There was no secret conversation between Mr. Colman and Frank. Nothing was said about the dagger, or melting up the daggers; nothing was said about the club; nothing was said about its being a "silly busi-

ness;" nor that the business was undertaken on Joseph's behalf.

I will not undertake to swear that he did not say "I told Jo it was silly business, and would only get us into difficulty." Will swear that he did not say that he went home after the murder, or "afterwards;" can swear that there was no conversation about the time of the murder; that Mr. Colman did not ask him about the time of the murder, that nothing was said about the dirk, and nothing about the club. Think it must have come to my knowledge in my brother Jo's cell that the club was under the steps; did know it when I came from my brother Jo's cell; think I must have got the information from Mr. Colman. Mr. Colman offered pardon to Frank, that he might have the opportunity, if he chose, to become a witness. Mr. Colman left it to them to agree which should turn State's witness. It had not been agreed that Jo should have the preference; If Frank did not assent, Jo was not to be State's witness.

Solomon Giddings. Reside and was in Salem on the night of the murder; I passed Mr. White's house about 11 o'clock and saw and heard nothing which attracted my attention.

William F. Gardner. Live in the next house to Capt. White's; passed there 25 or 30 minutes after 10.

Stephen D. Fuller. The plan made by me is correct; have been a surveyor 14 years, live in Boston; the distance from Essex street to Brown street through Capt. White's garden, is about 300 feet.

Nothing could be seen of Mr. White's house from the rope

walk steps; nor from the post by Mrs. Shepard's house; nor from the post by Capt. Bray's house; nor from any part of the space between the two posts on the south side of Brown street, except that through a small opening.

Charles G. Page. Saw the prisoner on the 6th of April, about 7 P. M., in Essex street, near the Salem Hotel. Forrester, Burchmore, Balch and I were together, and he asked us into the Hotel to take some refreshment; am a student of Harvard University; glazed caps were at that time worn by almost all the students who belong here. Camblet cloaks are also very common among students.

Cross-examined. I recollect the night, for on the morning after the murder I was accounting for myself, as was natural, and thinking what company I had been in; had some doubt as to what evening this was, when I was first called upon; then did not recollect the circumstances by which I could fix the time, but have recalled them since.

Moses Balch. On the evening of the murder, I think, but I am not positive, was with the prisoner, and Burchmore, and Page, and Forrester; first saw him in Essex street, between 6 and 7 o'clock. I was with him three-fourths of an hour; saw him again between 8 and 9; about 9 o'clock we all went to walk in Essex street; left the prisoner at the corner of Court and Church streets, about 10 o'clock, to go home.

Cross-examined. I cannot say positively that this was on the night of the murder. It was either on Monday or Tuesday

evening; cannot tell any nearer. The evening on which we were walking was dark and cloudy.

Zachariah Burchmore, Jr. On the evening preceding the murder, went with the prisoner, and Page, and Forrester, to the Salem Hotel, about 7. We stayed there about a quarter hour, and the prisoner left us. About an hour after, Forrester, Balch and I were sitting and smoking at Remond's, when he came in—about half-past 8. We all went out together just before 9.

Cross-examined. To the best of my belief, this was on the night of the murder.

John Forrester, Jr. Took a walk with the prisoner, I think, on the evening of the murder; met him in company with Balch, Burchmore and Page, and was introduced to him—this was about; 7 o'clock. We went to the Salem Hotel. He left us, and I saw him again in about an hour at Remond's.

Cross-examined. It was on the night of the murder, or the night before, or the night after, that I walked with the prisoner and the others. Never walked with them all but once.

Judson Murdock. Live in Brighton, and keep a public house, and saw a man whose name I have since understood was Palmer, but he then wrote his name J. C. Hall. He came there on Monday, 3d of April, at 9 in the morning, and stayed till the next day at 3 or 4, then went towards Boston on foot.

Joseph J. Knapp. Am father of prisoner; made an assignment of my property on the 6th of April; was at home that night a little before 10; prisoner just after 10 entered my front par-

lor and asked me if he should bolt the door; told him no, for Phippen was out, and I should wait for him; told him that I was very glad that he was at home in good season. He asked me if I wanted any assistance. I told him no; asked how the weather was, and he said that it blew fresh from the east; asked him if he knew the time, and he told me that it was just 10. He then retired to his chamber, and left me in the parlor; did not go to bed till after 2 o'clock. No person moved in the house that night except Phippen, when he came in.

Cross-examined. Saw Michael Shepard that night, at my son's office about quarter after 9 o'clock; saw Shepard again the next day; I am not certain where, whether at his house or in the street; believe that it was at his dwelling-house after breakfast. I had no conversation with him about Frank's being at home on the evening previous; next saw him the same day, at the Mercantile Insurance Office, but had no conversation with him about it then; saw him again in the evening of the same day, abreast of the Asiatic Bank; then had a conversation with him, and told him that my son was at home before half-past 10 o'clock. We had then no particular conversation, excepting he asked me if he could credit what was in circulation, the arrest that had been made; Joseph and Frank had been arrested then; the Crowninshield's had been arrested before; told Mr. Shepard that my son was at home in bed before half-past 10 o'clock, and that I was at home so as to know when he came in; I told him that

the clock had not struck 10 when I left Water's house, and that he was at home and had retired before 20 minutes after 10; told him that Frank came in and asked whether he should bolt the door; did not tell him that I recollected seeing Frank throw his cap upon the window-seat; don't recollect any conversation with Mr. J. W. Treadwell about the time that Frank came home on the night of the murder; have no knowledge of ever having talked with Mr. Treadwell on the subject, or of having said to him that I did not know what time Frank came home; or of having said, that "they said he came home at half-past 10."

Aaron Foster. Live and am the toll keeper at Beverly Bridge. Saw Frank Knapp pass the bridge some time after the murder with a sorrel horse; can't recollect his passing before the murder with such a horse.

Cross-examination. Knew Richard Crowninshield, Jr., very well; saw Frank pass the bridge after the robbery; there was a young man with him who gave me a 5 franc piece; of these we receive very few, sometimes 2 or 3 a week.

James Savary. Board at the Lafayette Coffee House. Was in the street on the morning of the 7th of April; went about 20 minutes before 4 o'clock from the Lafayette Coffee House to the stable in Union street; saw some person turn out of Capt White's yard and come up-street towards me; he came as far as Mr. Gardner's yard and then turned and ran; was then between the two Peabody's houses; saw him running down as far as Walnut street. As far as I can

judge he was a man about my size. It was dark and misty. He had on a dark dress.

Silas Walcutt. I was out on the morning of the 7th between 3 and 4. I saw a man nearly opposite Mr. Prince's house in Derby street; he was walking easterly when he saw me, he then turned round and walked back westerly seven or eight rods off. The last I saw of him was when he was just above Mr. Prince's house; he was a middling-sized man. The morning was pleasant though rather foggy.

John McGlue. At the time of the murder, owed Richard Crowninshield, Jr., some money, \$30 or \$40, for work he had done at the factory for me. On the Friday night before he was taken up, I paid him \$7. After the murder he came to Newport's to find me and I gave him an order for \$10. He told me a man was going to give him money and did not. This was Friday before he was arrested.

FOR THE GOVERNMENT.

George Wheatland. A few days after the murder, spoke of the interview between Phippen, Mr. Colman and Prisoner; asked Phippen why Mr. Colman went to Frank's cell; he stated that Mr. Colman was a very intimate friend of the family, and married Joseph; that he went to Joseph's cell, and Mr. Colman told him that he was engaged then. He said that when he went in, Joseph had been telling Mr. Colman everything, and he (Phippen) told Mr. Colman they must go, and tell Frank what they had been about; he said, he mentioned to Frank that Joseph was going to confess; that it

would be better as Joseph had a family, and Frank, if convicted, would stand a better chance to get a pardon. I asked Phippen if Mr. Colman had asked Frank any questions. He said he did ask him some, and that Frank answered; don't recollect what the question was, or the answer; told him that it would be enough to make Frank a principal; told him the confession was premature. He said that it made no difference, as they had evidence enough already to convict Dick as a principal.

Rev. Mr. Colman. Heard the testimony of Mr. Phippen Knapp, but it does not lead me to alter my own. My first interview with Joseph J. Knapp, Jr., was on Friday, 28th of May, at the examination before Justice Savage, at the prison; went afterwards to see him, with the approbation of the Committee of Vigilance, and stayed with him till near 1 o'clock; I went again about 3 o'clock, at his request. Mrs. Knapp also requested it. I remained with him till 4. Joseph desired me to ask his father and brother to come to him with me; went to Mr. Knapp's, Sr., for them. He wished me not to go, because it would be said Joseph was making a confession. Joseph made a full disclosure. While I was there, Phippen came to the cell, and requested me to admit him. I declined, till I had finished, then admitted him. Phippen said it must not be made, unless Frank consented. I then went into Frank's cell (as before stated).

On my return from Boston, on next day, met Mr. Phippen Knapp near the Halfway House, as he has stated, in a chaise with a gentleman; beckoned to him,

and asked him to come to my chaise. He asked me if I had said anything as coming from Frank; told him I thought I had to Mr. Stephen White, who was in Boston, and whom I had seen that afternoon. I wrote a note in pencil, to Mr. White, requesting him to consider Joseph as authority for what I had told him. Mr. Knapp desired that I would not go to see his brothers till his return; promised to wait till 1 o'clock, and did wait till three, and then went.

Cross-examined. As we came out of the jail, Mr. Phippen Knapp went to the cell of Joseph, to tell him, as I supposed, that Frank assented. When I went to the jail with Mr. Dexter, told him I had no doubt about Frank's having given me direction where the club was to be found; but went with him to Joseph, to satisfy myself; did not tell Mr. Dexter that I had nothing from Joseph, about the club. I asked Joseph whether he had told me particularly where the club was.

Michael Shepard. Had a conversation with Capt. Knapp, Sr., soon after the murder, while passing from the offices to my store; asked if Frank associated much with two young men that I suspected. He said that he did not but had kept very good hours of late, and that on the night of the murder Frank came home and went to bed at half-past 10 o'clock, "so Phippen told me." Capt. Knapp did not tell me as from his own knowledge at what time Frank came home. This was before the arrest of his sons, and I think before the arrest of the Crowninshields, and while we were walking from the site of the old Sun Tavern to the

head of Union street. He did not tell me that he was at home that evening and knew at what time Frank came in. Don't recollect that he told me that he came in at 5 minutes after 10 o'clock. He did not tell me of the conversation between Frank and him about bolting the door, nor that he heard the clock strike 10 before he left Waters' house.

Cross-examined. Did not ask him as to his own knowledge concerning what time Frank came in, and don't think that I put any question to him except as to his son's associating with these two young men.

John W. Treadwell. On Friday morning, 28th of May, I had a conversation with Capt. Knapp Sr. Took him into the private room at the bank, and told him that I was entirely satisfied of the guilt of his sons, and advised him to go to the jail, and get a confession from one of them if he wished to save either. He said he would go. Then asked him if he knew where Frank was that night. He said no. I then put the question, at what time did he come home? He said, I don't know, but I believe about the usual time, and added that he himself was up that night till very late arranging his papers.

George W. Teal. Live in Danvers and attend the bar at Dustin's. Saw the man now called Palmer there at about 6 o'clock p. m. on the 9th of April. He stayed there near an hour and a half. It was the day after Capt. White's funeral.

Stephen Brown. Lived at the Hotel in Lynnfield last April. I saw Palmer there on Wednesday before the fast. He came there about 9 in the morning, and stayed until 7 or 8 o'clock on

Saturday morning, except that he was away on Friday afternoon.

Perley Putnam. On Friday, week before last, asked Burchmore what he expected to testify to. He said he did not expect to be able to testify to anything. Asked him if he was positive that he saw Frank Knapp on the evening of the murder. He said he could not swear that he did.

Rev. Bailey Loring. John Forrester, Jr., has lived with me at Andover a year, except occasionally, when he visited his father in Salem. A week before the trial commenced, two gentlemen, whom I understood to be Mr. Rantoul and Mr. N. Phippen Knapp, came to my house to see Forrester. Said to him, do you know anything about the murder? He said that about the time of the murder he was in Salem, and was walking with Frank Knapp and some other young men. Asked him if he could recollect what night it was. He said it was on that night or about that night. Asked him if Page could not recollect the night; he said he could not, and that the gentlemen who came up wanted him to go to Salem to meet the others to bring up some circumstance to refresh their recollections. They told him if he did not come they would summon him.

John F. Webb. Conversed with Samuel H. Knapp before he went to sea, about the prisoner. He was in the counting room the 8th of June. Asked him if he knew when Frank was at home the night of the murder? He said he did not. He was not at home when he (Samuel) went to bed.

Joseph White. Know Charles

Page. We are both members of college. I have conversed with him about the murder. On the 19th of this month I was riding to Cambridge with Page. On the road he said that it was Monday or Tuesday or Wednesday evening that he was with the defendant, and he could not tell which. Was not in court when he testified; was out of town at a friend's house and read his testimony in the printed report. Mr. Stephen White is my father.

Dr. Abel L. Peirson. On Thursday, 8th of April, was requested to examine the body of Capt. White. Doctor Johnson, some of my pupils and several spectators were present. It was the first time that I had seen the body after the murder. The wounds on the head have been correctly described by the other physician. On examination, we found two groups of wounds on the body. There were six stabs three inches from the left pap and near together. About six inches further down there was another series of wounds, seven in number. These two series of wounds differed so much that I inferred they were made by different instruments.

Judith Jaquith. On Friday evening, April 2, about 10, was passing down Brown street; saw a group of men standing by the rope-walk steps; one of them was pointing towards Capt. White's house. There were three of them, one sitting and one standing on each side of him. The one standing had something in his hand I could not see. The two standing had on cloaks with capes; the one sitting had a hat and surtout without a cape.

Cross-examined. Saw no other

person on the street but these. I told of it the next day.

Lewis Endicott. Had a conversation with Joseph J. Knapp, Jr., in January last, about the time that Capt. White had an ill turn. He said if he had been in town Mrs. Beckford would not have sent to Boston for Mr. Stephen White, for he could destroy all his own notes; that Capt. White had made a will, and that Mr. Stephen White was not executor, but Mr. John W. Treadwell alone; that black and white would not lie; that Mr. Lambert was the only witness. Asked him if he had seen the will; he said he had. Asked him if Capt. White did not keep his will locked up; he said, yes, but there was such a thing as having two keys to a lock.

FOR THE PRISONER.

Daniel Potter. Have conversed twice with Leighton about the murder. Once last Friday afternoon while the jury were out. He said that Frank Knapp came to Wenham soon after breakfast, on the day that he overheard the conversation that he had testified to. Saw him again two hours afterward. He said Frank was viewing the farm that morning; he said nothing of the conversation that he had heard.

Cross-examined. I live in Salem; am a blacksmith. My meeting with Leighton was accidental. Had a bet on the last trial, on the verdict while the jury was out the first time. I have none now.

Stephen Field, Jr. Overheard the conversation between Leighton and Potter, as he has testified to it. I had no conversation with Leighton myself.

MR. DEXTER FOR THE PRISONER.

Mr. Dexter. Gentlemen: You have now heard all the evidence on which you are to form your judgment of life or death to the prisoner. He stands before you for that judgment under terrible disadvantages. I will not repeat to you what has already been stated on that subject. I have neither time nor strength to expend on anything but the law and the evidence. You see around you proofs of the power against which the accused has to struggle in his defense. You see the extraordinary array of counsel, active and inactive, brought in aid of the Government, or withdrawn from the reach of the prisoner. You have witnessed the efforts that have been made by those who could take no other part in the prosecution, to fasten upon him the evidence of guilt; and you may anticipate the power and eloquence with which the case is to be closed against him. Gentlemen, why is all this? While the official prosecutors are competent to discharge the duties of their office, why are they surrounded and replaced by this extraordinary assistance? Is there anything in this cause that threatens to turn aside public justice from its proper victim?

If there is legal evidence against the prisoner, can there be a doubt that he will be convicted? And if there is not, is a verdict of condemnation to be wrenched from you by talent and eloquence, which the ordinary course of a criminal trial would fail to procure? But, gentlemen, it is not enough that you perceive all this. I need not farther caution you against its power. There is, however, a more dangerous influence in this case—one that you are not in a situation to perceive, but which presses most heavily on the prisoner. We care less for the array of counsel than for the array of the community against him. We should not fear even such efforts as we expect here, if the case could be fairly brought before you in evidence. But we have greatly feared the effect of this hostile atmosphere on the testimony. We have feared, and found, that in such a state of excitement, and when such arrangements have been made for the success of the prosecution, no man

could take the stand, an indifferent witness. He is to be esteemed a public benefactor on whose testimony the prisoner is convicted, and he who shrinks from the certainty expected of him, does it at the peril of public displeasure and reproach. If proof of this were needed, it might be found abundantly in the variance of the evidence on the two trials of this cause. But this is a small part of the evil; the cause had been tried and the witnesses examined and re-examined long before a jury was impanelled; and this last reinforcement of evidence is but proof of what has been done before for the conviction of the prisoner.

After all that has been said abroad, we fear that it may even seem strange that we should claim for the prisoner that presumption of innocence which the law affords every man. But it is not the less your duty to extend it to him; and this presumption is not only that he is innocent of all moral guilt in this matter, but even if this shall fail him, still that he is innocent of the particular crime charged in the indictment. You must be satisfied by the evidence in the case, beyond reasonable doubt, of the truth of the whole and of every material part of the charge as it is here laid against him. I say this, gentlemen, because a new doctrine of the law has been advanced to meet the difficulties of this case. We have been told that the prosecution will contend that if the general guilt of the prisoner has been established, there is a presumption of law that he is a principal offender; that the burden is thrown on him to show that he is guilty in a less degree. It is enough for us to say that this is a doctrine subversive of the very foundation of all criminal law; that it strikes at the root of that humane provision, that no man's guilt is to be presumed, and that it is unsupported by any authority which has been or can be adduced. It was attempted, indeed, at the last trial to support it by the analogy of that rule, which when a homicide is proved, presumes malice to constitute it murder. But life is not to be taken away by analogy; much less by the analogy of an obsolete and savage rule of law, on which, however it may stand in the books, neither Court nor jury has

ever dared to act. No man was ever yet convicted of murder in this country on that bloody presumption; and a jury that should convict upon it would deserve to be hanged upon their own verdict.

What, then, is the crime of which the prisoner stands indicted? It is, that he was present, aiding and abetting in the murder. Not that he is guilty of the murderous intent, or that he procured the murder to be committed, but that he was present at the perpetration of it, and gave his assistance to the murderer.

These are the facts of which you are to be satisfied by the evidence you have heard before you can return a verdict against him. But we admit the law to be well settled, that an actual presence is not necessary to constitute the prisoner a principal. We admit that any place from which actual physical aid can be given in the commission of the murder, is presence within the meaning of the law. I need not cite to you the cases on this subject. They have been repeatedly examined and compared.

We claim that this is the result of all of them, and that beyond this the doctrine of constructive presence never has been carried; that to make a man an aider and abettor in a felony, he must be in such a situation at the moment when the crime is committed that he can render actual and immediate assistance to the perpetrator; and that he must be there by agreement, and with the intent to render such assistance. All these circumstances, the intent, the agreement, and the actual power to assist in the commission of the crime, must concur to make one really absent from the immediate scene of it constructively present. No previous consent or inducement, no encouragement at the moment short of the hope of actual and immediate physical assistance, is sufficient for that purpose. This, then, and this only, is the question that you are to try on the evidence you have heard, and from your own view of the scene of the murder: Was the prisoner, with such intent, under such an agreement, in such a situation, that he could render actual aid at the moment when the murder was

committed? With this view of the case, I will now ask your attention to the evidence on the part of the prosecution.

Sensible of the weakness of the evidence of the prisoner's presence in Brown street (especially as it stood on the first trial) the prosecutors have relied much on the aid of the conspiracy. There are two views in which this may be considered. If by a conspiracy is meant that the prisoner had before consented to, or contrived to murder, the evidence is most material. It goes directly to one of the facts necessary to constitute him present, for he could not be there to aid unless he were a party to the scheme. To so much of the evidence on this point no objection can be made. But a much more extensive and less legitimate use has been made of this conspiracy. On the ground that a conspiracy being once established, the acts and declarations of any one confederate are proof against the rest,—all the proceedings of the elder Knapp and of the two Crowninshields have been made evidence against the prisoner. Even their individual acts subsequent to the murder have been brought in, and an attempt has been made to introduce the separate confession of Joseph Knapp. On this point we take the law to be clear, that the acts and declarations of one conspirator, in the absence of the others, is no proof against them of anything but of the object of the conspiracy. They cannot be used to enforce the proof that the conspiracy existed, or that the defendant was a party to it, but simply to show its design. And, although the evidence has been admitted, because it was difficult to distinguish its tendency until it was heard, you are to receive it no farther than is warranted by this rule of law. If then, as the prosecutors contend, the evidence of Leighton is sufficient to indicate the object of the conspiracy—if the words he so ingeniously overheard can, as is said, mean nothing, but that the two Knapps and Richard Crowninshield had agreed that the latter should murder Captain White, then all the remaining proof of the conspiracy is superfluous. The only object for which it could legally be used was accomplished at the first step. The Wenham robbery, the robbery of the Knapps'

house, the preceding letters of Joseph Knapp to Stephen White and to the Committee, and such other circumstantial stuff that has been introduced, may be used to aggravate the general appearance of the whole transaction, but they have no bearing on the case of the prisoner. The letters may be proof that Joseph Knapp was guilty, but what is that to the prisoner? He is not to stand or fall by the subsequent and independent acts of Joseph. Why are these evidences against him, more than Joseph's confession given to Mr. Colman? They are but confessions made after the fact and without the knowledge of the prisoner. As to the robbery, it may have been real or pretended. But whether real or pretended, what has it to do with the murder of Capt. White? Not a particle of extrinsic proof of its falsehood, or of its connection with that event has been produced. It has served as a basis for much irony and indignant denunciation; but it was believed by Mr. Palfray, who published it, and by the Committee. And yet you are called on from its intrinsic incredibility to convict the prisoner, not only of the falsehood of that story, but as a corollary of the murder of Mr. White. Considering these things as of no weight in the cause, I shall pass by them without further remark. Some other circumstances may be dispatched in the same manner. The conspirators wore daggers—the proof is that the Crowninshields habitually wore them before the murder, and that the prisoner never had one until long after. And whether he then wore it for murder, or in boyish bravado, you may judge from Leighton's account of the manner in which he used it upon him. Pleased with his new weapon, he "pricked me bull calf till he roared;" and how much of Leighton's testimony is to be ascribed to that, is a matter of no great consequence, so incredible is the whole.

So of the five franc pieces. The proof is that Joseph received five hundred on the 21st of April, and that George and Richard Crowninshield spent nine between that time and their arrest—nine five franc pieces! Richard was to receive, according to Palmer, one thousand dollars for the murder! and we are called upon to account for nine of these pieces, when

the whole five hundred would not have been half of the price agreed to be paid. And why should not the whole five hundred have been paid, and, if they were, why are not more than nine traced to the Crowninshields? The coin, besides, is no uncommon one; they carry no earmark; the witnesses tell you they pass currently, commonly, here. They are the regular return from Point Petre; and in large quantities they go into the bank; in small quantities they go into circulation. But suppose it otherwise, how does this prove Francis Knapp guilty of this murder? Is he shown to have any of this pernicious coin? All the evidence about them is of the nine spent by the Crowninshields and that Joseph Knapp gave Hart three to buy meal for the family. Besides, the proof of any communication between Joseph and Richard after the murder completely fails. When were these five franc pieces paid to Richard? The whole evidence is, that about the last of March, Richard Crowninshield stopped at Lummus's tavern with a stranger who asked if Capt. Knapp had been there lately. They left their chaise and walked away together. Afterwards, about the 20th of April, Richard and another person, stouter than the prisoner, called at Lummus's in the evening and spent a five-franc piece. Hart and Leighton testify that somewhere about that time Frank Knapp came in a chaise to Wenham with a stranger who sat in the chaise at the door an hour or an hour and a half. They differ very much in their accounts of the transaction, but neither pretends to know or believe that the stranger was Richard; or that any money was paid. In fact, money could not well have been paid at that time in five franc pieces without observation. Neither Hart nor Leighton observed anything like it. All they know is that there was a long conversation between the two Knapps in the house and between them and the stranger at the door. They saw nothing and heard nothing to show what was the subject of those conversations.

One word about George Crowninshield; he has been shown by the government's witnesses to have been in Salem that evening and to have gone to bed at the house of Mrs. Weller

about 11. The prosecution has proved an alibi for him and we shall not disturb it. On the contrary, we have shown you by evidence, which is unnecessary to recapitulate, that he came to Salem with Selman and Chase on other business, and we have traced him from place to place through the whole evening. It seems to be the object of the government to show that he could not be the man in Brown street. We agree that he was not; but we think it material to you also that neither was he anywhere in the neighborhood of Mr. White's house at the supposed time of the murder. The testimony of Selman, corroborated as it is at every step, establishes that fact. Whoever then, was the man in Brown street, he was the only one in the vicinity of the house, and that will become a material fact when we consider the purpose for which he was there.

Much use was made of the testimony and books of Osborne, the stable keeper. It appears by them, that the prisoner was in the daily habit of riding, and often to Danvers, and to Wenham, early in the month of April. That he went to Danvers on the 2nd of April, as testified by Palmer and Allen, and afterwards on the same day hired a chaise to go to the Springs. That on the 6th of April he went to Danvers and after that did not ride till the 19th. We see little that can fairly be inferred from all this but that there was a frequent intercourse between the prisoner and the Crowninshields; a circumstance undoubtedly unfavorable though slight, and between him and his brother Joseph's family, a matter from which nothing can be inferred. Two or three circumstances, however, attending these rides, have been selected as highly suspicious. In the first place, the frequency of them just previous to the time of the murder and the interruption of them just after. If the books are examined it will be found that these rides are as frequent in the months of February and March as in April, making due allowance for the difference of weather. The prisoner returned from sea in January and he appears to have hired Osborne's horses almost every day from that time until the 6th of April. That eve-

ning was marked by the failure of his father, as well as by the murder of Capt. White—a circumstance quite sufficient to account for the discontinuance of his visits to the stable, and also for another fact, somewhat relied upon.

The place, it seems, for which the chaise was hired on the 6th of April, is still blank in the book. Now Mr. Osborne testified that it was the habit of the prisoner to fill out and rectify the charges against him by his own memorandum book; but this he had no opportunity of doing after the 6th until the 19th; and it does not appear that he ever was asked where he had been on the 6th; so, too, of the entry on the 2nd. The chaise was hired for the springs; but those words were afterwards struck out, and to ride put in their place, in the prisoner's handwriting. But the first words are not so erased as to be concealed; they are merely crossed out with a single line of the pen; and this was in conformity with the practice permitted by Mr. Osborne, who tells you he had perfect confidence in the prisoner, and thus suffered him to have free access to his books to make his own charges. One circumstance more, and I have done with these minor points.

It is thought very strange, that on the 6th the prisoner ordered his chaise brought to the court house, instead of getting in at the stable. A hundred innocent reasons may be imagined for that, while it is hardly possible to think of one in any way connected with the murder. He was much more likely to be noticed if seen getting into a chaise in Court street than at the stable, because one was a usual, the other an unusual thing. The fact that he had a chaise was as much known at the stable; and if he wished to conceal the direction in which he rode, a much simpler expedient would have answered the purpose. Why did he not start the contrary way, and drive round the town until he could escape unnoticed? He may have had an errand in Court street; he may not have wished to be seen leaving the stable on the day of his father's failure. It is so simple a thing that any reason is enough, and none need be sought for. But the most indif-

ferent acts of the prisoner have been traced out with inquisitorial diligence, and magnified into proofs of crime. Is there anything in all these circumstances inconsistent with the prisoner's innocence? It is not enough that they are consistent with his guilt. Before circumstantial evidence can amount to proof, it must be impossible to explain it without supposing guilt. So far, certainly, all may be as well explained without that supposition. And yet, from the way in which these things have been heretofore insisted on, it would seem that they were looked upon as conclusive evidence. It seems to be enough if the prisoner can be found anywhere or doing anything on the day of the murder, which might, by any supposition, connect him with it. A thousand suspicions, it has been well said, do not make one proof. And what are these but possibilities? There is not one among them that deserves the name of a probability. A thousand such possibilities would hardly make one suspicion.

But one thing that has a little more show of proof, or rather of suspicion, must be disposed of, before we come to the direct evidence of the conspiracy. I mean Mr. Burns' story. Burns is a Spaniard; and although I would not discredit him on that ground alone, I cannot have the same confidence in his oath I should in that of one of our own citizens. He hardly speaks English intelligibly, and there is some doubt whether he was finally understood as he meant. His story is intrinsically improbable, and he has discredited himself by his own contradictions. He tells you the prisoner called at his stable and asked if he were alone; being assured that no one was there, he wished to be yet more private, and asked if he could speak with him in the chamber. And all this secrecy was to tell Burns that the committee had heard that he (Burns) was out on the night of the murder, and that they suspected him—and that if he saw any friends that night he had better hold his tongue about it, and that Joseph Knapp and the prisoner were his friends; and then follows an idle tale about the prisoner's accusing Stephen White of the murder and then threatening Burns with his dagger be-

cause he would not believe it. Now what possible object could the prisoner have in all this but to bring himself into suspicion? No one had at that time whispered a suspicion against him. Burns had not pretended to have seen or heard anything of him that night, near the scene of the murder. But it may be asked, what motive could Burns have to fabricate this story? It is in vain to deny that there is a sufficient motive. We have seen the operation of it on more than one witness, and that Mr. Burns is above its influence I see no special reason to believe. You observed the manner in which he testified—how zealously he defended Mr. Stephen White from the aspersions of the prisoner—and how impossible it was for the counsel to obtain anything from him but impertinence by the mildest cross-examination. Such a man as Burns well understands what is the source of favor in this trial. He as well as others sees that the prisoner is a helpless and friendless culprit, pursued by all the wealth and respectability of the town. And can you see in this no motive that could lead such a man as Burns to claim his share in the merit of his conviction?

But be his story ever so probable, you cannot believe it—he swore positively on the first trial that this happened after the Wenham robbery, and on this he has sworn positively that it was nearly three weeks earlier—he has described the prisoner's dagger as totally unlike any one he ever had, and differently at his two examinations. Let him and his story go for what they are worth.—I trust that the prisoner is in no danger from them.

I come now to what is called the direct evidence of the conspiracy. It rests on two witnesses, Leighton and Palmer; or rather it rests on Leighton alone, for without his testimony that of Palmer would not be admissible. Palmer pretends only to have had a conversation between the two Crowninshields in the absence of the prisoner. Now, to make this admissible against Frank Knapp, a conspiracy must first be established between him and the Crowninshields. For that purpose Leighton overhears the two Knapps tell each other the

whole story, while he listens behind a stone wall. Now, it may be supposed that this very deficiency in Palmer's story is proof of its truth. Not so. Palmer's story was first told and put in writing to convict Richard Crowninshield, and it would well enough stand alone for that. But when Richard was out of the way, and Frank became the principal, a connecting link was wanting; and to furnish this is Leighton's office.

And what is Leighton's story? Of all the gross improbabilities that ever were laid at the foundation of a cause, this is the most gross. It is just the clumsiest contrivance of a play, where the audience is informed of what has taken place behind the scenes by the actors telling each other what they have been doing together. If it were told with the utmost consistency, could you believe it for a moment? Why, gentlemen, do but listen to it. He tells you that Frank Knapp came to Wenham about 10 o'clock (and Potter says he told him he came there immediately after breakfast, which would be about 7)—that he and Joseph were together all the morning in the fields, and that after dinner he left them together talking at the gate by the house, while the witness went down the avenue to his work. There was abundant opportunity, then, for them to talk in private about what most concerned them; but after the witness had passed through the gate at the end of the avenue, and taken his place behind the wall, he heard voices in the avenue; without rising, he peeped through the gate and saw the two Knapps about twenty-five rods off, coming towards him; that they ceased talking until they arrived within three feet of the wall, and then began this dialogue: Said Joseph, "When did you see Dick?" "This morning." "When is he going to kill the old man?" "I don't know." "If he don't do it soon I won't pay him"—and they then turned up the avenue and walked away; and this is all the witness heard.

Now, is anything more than a bare statement of this story necessary to show its falsehood? For what purpose, under Heaven, could the Knapps have postponed all conversation

on this most interesting subject till that very time? They had been together all the morning; they were plotting a murder; and Frank had been that very day to see the perpetrator; and yet neither Joseph had the curiosity to ask, nor Frank the disposition to speak of the matter, until just as they reached the place of Leighton's ambuscade; and there in an abrupt dialogue of one minute's duration, they disclose the whole secret, and walk back again. Not a word more is heard by the witness. The conversation evidently began and ended with these words. Really it is too miserable a contrivance to deserve much comment. But there is a remarkable mistake about this story which stamps it with falsehood. Leighton fixes the conversation on Friday, the 2nd of April. And why on that day? Because he knew, as well as every person who has read the newspapers, that on that day Frank did see Richard. But unluckily he fixes him at Wenham at the very hour in which it now appears, from the testimony of Allen and Palmer, that he was at Danvers. Leighton says that Frank came to Wenham at 10, and said he had seen Dick that morning; but it now appears that Frank did not go to Danvers until 2 o'clock, and at that very hour Leighton pretends to have heard this conversation at Wenham. Again, Palmer tells you that at that interview at Danvers, the plan first proposed to the Crowninshields—that George spoke of it to Richard and himself as what he had just heard from Frank; and yet from this dialogue at Wenham it seems that Joseph was impatient at the long delay of Richard. "When is Dick going to kill the old man?" "If he don't soon I won't pay him." How are these things to be reconciled? Leighton tells you, too, that he never mentioned this conversation until after the murder. And why not? Why, forsooth, "he did not think of it." He had heard a plain, palpable plot of murder contrived by his own master, and yet he did not think of it! He did not tell it to Mr. Davis when he joined him at his work, nor to Hart, who slept in the same room with him; and when he hinted after the murder to Starrett, at two different times, that he "knew

something," and had "overheard something about the murder," Starrett had not the curiosity to ask him what it was! He is directly contradicted by Hart, both at the time when he told him of it and as to the circumstances of Richard's supposed visit to Wenham. Hart says he never heard of this conversation until after Leighton's examination at Salem, and that Leighton told him the committee brought out a warrant to commit him to jail if he did not tell what he knew—facts both of which Leighton denied on the stand. Now what account does he give of the manner in which his evidence was brought out? He says he was summoned to attend court, taken out of the field where he was at work, and carried to Mr. Waters' office—he was kept there forenoon and afternoon, more than four hours, closely questioned and threatened, but he told nothing. Why did he not tell? On the first trial he swore he remembered well enough, but did not choose to tell—to be sure he swore both ways about it, but he finally said he did remember and would not tell; and on this statement a most ingenious argument was built by the counsel in his favor. "He would not betray his employer; improper as it was to deny what he knew, he had fidelity enough to refuse." But on this last trial he takes all that back; he swears positively he did not remember a word about it. Equally regardless of his own oath and the argument of the counsel, he denies the whole. He says it all came into his mind about two days after his return to Wenham—the very words. What brought it to his mind he cannot tell. Now what credit can you give to this boy and his story? But one of the most remarkable improbabilities of it is yet to come. He says he told the gentlemen at Mr. Waters' office that if they would come to Wenham the next day, he would tell them all he could remember. That was on the 22nd of July. Now, do you believe if that were true they would not have gone? When everybody in Salem was inquiring about the murder, and some of the gentlemen at Mr. Waters' office had been doing nothing else for months before, and when they had taken all these pains to extract from Leighton what he knew,

do you believe that after such a promise they would neglect to follow him up? And yet he tells you he heard nothing from them until ten days after that time. Then they came to Wenham and he told them all about it. Now, gentlemen, if you had seen as much as we have of the diligence of the committee and subcommittee in looking up testimony in this cause, you would not think this the least improbability in Leighton's story. Consider how important his testimony is. Without it, Palmer's and the whole evidence of the conspiracy would be useless. It is the very cornerstone of the prosecution. And yet it was not thought worth looking after for ten days immediately preceding the trial. Again; we shall be asked what motive has Leighton to swear falsely? and we answer, fear, favor, and hope of reward. He was told at Waters' office he should be made to remember—he said he was threatened with a warrant, and he knows of the immense rewards that have been offered. He remembers the pricking with the dagger, and he swears now to you that if Knapp escapes hanging, he expects he will kill him. Under all these circumstances, I put it to your consciences to say if you can take this boy's word against the life of the prisoner. If you disbelieve it, then you must wholly reject Palmer's testimony, and all evidence of what was said and done by anyone but the prisoner, or in his presence. There is absolutely no other evidence to connect the prisoner with Joseph or the Crown-inshields in this matter.

But who is this Palmer, this mysterious stranger who has been the object of so much curiosity and speculation? He is a convicted thief. We produce to you the record of his conviction of shop-breaking in Maine. He is an unrepenting thief, for he tells you on the stand he cannot speak of the stealing of Mr. Sutton's flannels in Danvers, committed since his discharge from the State prison, without criminating himself. Mr. Webster (the witness) tells you his character among his neighbors in Belfast is as bad as it can be. He tells you himself that he has passed in his wanderings from tavern to tavern, sometimes by the name of Palmer, some-

times that of Carr, sometimes that of Hall (the alias of the notorious Hatch) and sometimes that of George Crowninshield. The latter name he gave at Babb's house when he was called on to settle his bill; and whether he settled by a note he cannot remember; but Mr. Babb remembers what he did, and signed that note George Crowninshield! And how came Mr. Palmer a witness before you? He was arrested as an accomplice in the murder at Prospect; committed to Belfast jail; brought up by land from Belfast in chains; put into a condemned cell in Salem—remained in jail two months, neither committed for trial, nor ordered to recognize as a witness; but kept for further examination at his own request, until he is brought out and made a free man on the stand. Now, what is this man's credibility? If his conviction had been in Massachusetts he would have been incompetent; he could not have opened his mouth in court. But the crime is the same—the law violated is the same—and the infamy and the punishment are the same in Maine as in Massachusetts—and his credibility is the same. Add to that conviction, his subsequent theft, falsehood and forgery, and you have left in him but a bare possibility that he may speak the truth. As to his temptation to testify against the prisoner, you see how he was brought here, under what liabilities he stands, and what is the price of his discharge. He tells you himself that, though a disinterested love of public justice first moved him to inquire into the matter, he thinks he deserves some little pecuniary reward for his exertions; and doubtless he thinks that reward will depend something on the success of them. But what is his story? It is that being himself concealed at the house of the Crowninshields in Danvers, he saw Frank Knapp and Allen come there on Friday, April 2, about 2 o'clock; that Frank and George walked away together, and after their return Frank and Allen rode off—that the Crowninshields then came into the chamber where he was, and George detailed to him and Richard the whole design and motive of the murder as a matter then for the first time communicated. Now perhaps there is nothing in-

trinsically very incredible about this story, except its too great particularity. If it be false, it is so artfully engrafted on the truth, that Frank Knapp was there at that time, and had an interview with George alone, that it would be almost impossible to detect it. Palmer, too, must be allowed the credit of ingenuity, whether his story be true or false. It is impossible for anyone in his situation to have testified with a more artful simplicity. And I admit, too, that he has had the good sense to tell no unnecessary falsehood. The only instance in which he has tripped, is his saying that George Crowninshield told him on the 9th of April that he had melted the dagger the day after the murder for fear of the Committee of Vigilance; whereas, that committee was not appointed until late in the evening of the 9th. How that little impossibility is to be disposed of is not very material. But this conversation is too particular. Like Leighton's, it goes too much into all that the case requires. Why should the Crowninshields tell all this to Palmer without first sounding him? He says he rejected their offer immediately. Would they risk detailing the whole plan to him before securing any indication on his part of assent? Nay, after having communicated it to him and after he had refused to have any part in it, would Richard have gone on to execute it? He was not a man to trust his life to the keeping of such a witness as Palmer, who had refused to become an accomplice.

There is one circumstance in which the story is a little too ingenious. George speaks to Richard and Palmer of Stephen White as a certain Mr. White that lived at Tremont House in Boston; and then witnesses are brought in to prove that Mr. Stephen White actually lived there at that time. This is too shallow. Did not the Crowninshields, with their Salem connections, know Stephen White by name? There is not a man in the county that does not know him. This is meant to look like a corroboration; but it looks much more like contrivance. Now, such a story from such a man deserves no manner of credit unless corroborated by other testimony. Is

Palmer corroborated? In the immaterial circumstances of his story in which he had the sense to tell the truth, and no temptation to lie, he is confirmed by other witnesses. But on the only important point he stands alone and unconfirmed. The conversation between him and the Crowninshields rests, and must of necessity rest, on his single statement. But it has been said that his letter corroborates his story. How can that be? Would he be such a fool as to swear now to anything inconsistent with his letter of which we had a copy? The mere fact that his testimony is consistent with his own letter amounts to nothing. But does that letter contain anything which he might not well have known, whether his story be true or false, and which is now confirmed by any other witness? Not a word. It states that he knew what J. Knapp's brother was doing for him on the 2nd of April, and that he was extravagant to give a thousand dollars for such a business; and that is all. The rest is but vague and unmeaning menace. Now, it is undoubtedly true that Frank Knapp was at Danvers on the 2nd of April, and had a private conversation with George; and that Palmer was at Danvers and saw him. And that single fact is the only one contained in the letter, which is corroborated by any other witness. That he was there to engage the Crowninshields in this business and that they were to have a thousand dollars, comes from Palmer himself and from him alone. Even Leighton's story, though intended to corroborate it, contradicts it by inconsistency in time, and in the age of the plot. But he says nothing of the thousand dollars. But why should Palmer venture to mention a thousand dollars if that was not the sum offered? And why should he have written the letter at all, if he knew nothing about Frank's business at Danvers? The solution is easy. It supposes, indeed, some skill in Palmer, but we have seen enough of that. Consider when this letter was written. Not until after the arrest of the Crowninshields. If he had really heard this plot laid, why did he not give information of it immediately on hearing of Capt. White's death, and of the immense rewards offered for the discovery of the mur-

der? He tells you he wrote that letter to bring the matter to light; from a pure love of public justice. Public justice has been rather a hard mistress to Palmer; but he is not the less faithful to her. Now, why did not that love of public justice induce him to inform against the Crowninshields and Knapps before anybody else suspected them, and while public justice had some thousands of dollars to give him to obliterate the remembrance of her castigations? He had the whole matter in his own breast. He had heard every word of the plot. If they were guilty he had information enough to lead to their detection. Yet he waits five weeks after the murder and a fortnight after the arrest of the Crowninshields and then writes this letter to Knapp, demanding money—but in fact, as he tells you, to get evidence against him. Is this credible? But what led him to suspect the Knapps? What was more easy? He probably knew that J. Knapp's mother-in-law was an heir of White—he saw F. Knapp in private conversation with George Crowninshield four days before the murder, and he saw in the papers that the Crowninshields were arrested as the murderers. It required less than Palmer's shrewdness to put these things together. As to the thousand dollars, it may be his own pure invention—there is no other evidence of it—or it may be that he heard the Crowninshields say after Frank left them that they expected a thousand dollars without saying from what source. His letter is therefore no corroboration at all. It does not contain a fact proved by anybody but himself except that Frank was at Danvers on the second; nor is Palmer's story on the stand corroborated by any other witness in a single fact, that had not been published in every newspaper in the State, weeks before he testified.

This is the evidence of the conspiracy. I have but two remarks to make on it. If you could believe it on such evidence, the only effect of it would be to show that Frank Knapp was an accessory; and it makes nothing said or done by J. Knapp or the Crowninshields evidence against the prisoner. For the very proof relied on to establish the fact of the

conspiracy proves equally well all that of which such acts and declarations are legal evidence; that is, the design and object of the conspiracy.

The most, then, that can possibly be inferred from this evidence, bad as it is, is that the prisoner was an accessory before the fact; and that if he were in Brown street at the moment of the murder, and in a situation in which he could give assistance, there would be a presumption that he was there for that purpose. We are willing to meet the government on that ground. We deny that he was there; and we deny that the man who was there could by possibility have given any assistance.

Two men were seen in Brown street at half past 10, of whom one is alleged to have been the murderer, and prisoner the other. But what proof is there that the murder was committed at that hour? If that fails, the whole case fails. Was there anything in the conduct of the men to show it? One man was seen waiting half an hour in Brown street, and a little before 11 he was joined by another, who came either from the common or from Newbury street; and might as well have come from one as from the other, as he was first seen in the middle of the street. The man that came from the eastward did not run; he walked directly up to the other, held a short conference with him; they moved on together a few feet—stopped again; talked a few moments and then parted; one stepping back out of sight and the other running down Howard street. Of the two witnesses that saw them, Bray thought they were about to rob the graveyard; Southwick suspected; but what to suspect he did not know, and his wife suspected that he had better go out again to watch them. A murder was committed that night in the next street, and this is all the proof that these were the murderers. A club indeed was afterwards found in Howard street; but neither of these men had any visible weapon.

What say the doctors? Dr. Johnson says he saw the body at 6 and then thought it had been dead between three and four hours—Dr. Hubbard now thinks longer; but says at the

time he agreed with Johnson. There is pretty strong proof that the murder was in fact committed about 3 o'clock.

Savary saw a man between 3 and 4 come out of Capt. White's yard and walk up Essex street; but meeting the witness, he turned about and ran down as far as Walnut street. Walcutt about the same time, and near the lower end of Walnut street met, probably, the same man, coming towards him; on seeing him he turned about and walked the other way. Now, which was most likely to be the murderer, the man who might have come either from Newbury street or from the Common, at 11, or the man who was actually seen to leave White's yard at half past 3, and twice turned back, and once ran away to escape observation? But here we are met with a dilemma on the second trial. What I have stated was the whole of Savary's testimony on the first trial. He was then asked whether he had ever heard of that man since and he said, no. Now he is asked whether he has seen that man since, and to the utter astonishment of everyone, after giggling like an idiot, he says he thinks it was the prisoner! And this is seriously taken up by the counsel for the prosecution, and Dr. Peirson is examined to prove that the stabs were made with different instruments. You have heard his reasons for it. His opinion is that some of the lower wounds, being longer than the upper, must have been made by a broader dagger or a sword-cane; these lower wounds were oblique and of various lengths, but he thinks that a dagger, however sharp at the edges, driven obliquely into the body, will not make a wound longer upon the surface than the breadth of the dagger. This seems very much like saying that the human skin may be pierced, but cannot be cut. It is certainly contrary to common observation if not to common sense. Dr. Johnson says he saw no proof of more than one sharp instrument. But for what possible purpose, if Frank Knapp had met the murderer in Brown street, and heard that the deed was done at 11, should he have gone into the house again, and stabbed the dead body? Like another Falstaff, did he envy the perpetrator the glory of the deed and mean to claim it as his own? or was it for plunder? No—

for the money was not taken. The two suppositions that the prisoner was engaged in the murder at half past 10, and that he visited the house at half past 3, are totally irreconcilable. We deny that he was in Brown street, and we will take all the risk of Savary's testimony. This is but one of the many examples of the rapid growth of evidence in a popular cause. Savary's first story was true; he has told it so from the first day after the murder, and it is confirmed by Walcutt; but this last edition of it is foolish as it is wicked, and needs no refutation or comment to those who saw and heard him on the stand; the manner was as indecent as the matter was absurd. The government must satisfy you beyond reasonable doubt either that the murder was committed at half past 10, or that the prisoner was the man who left the house at half past 3. You cannot believe both; and can you say that you are satisfied of either? Is there not a great, a very reasonable doubt of both? You must not convict the prisoner between the two. You must be as well satisfied of one as if the other did not exist. Which, then, will you take? That he was the man seen by Savary? If Savary were honest and credible, you would have but his opinion from a glance in a dim and misty night (for it grew more dark and cloudy towards morning); a thing certainly not to be relied upon, standing alone, as it does. Was the murder committed at half past 10? What is the proof of it? and what was the man doing in White's yard at half past 3? and why did he run when he was seen? Which acted most like a murderer, the man that came into Brown street, or the man that ran from the yard? Which was the hour most appropriate to so horrible a deed? That at which a party was breaking up at Mr. Deland's, the next house to White's, or the still hour before daylight, when no person was abroad but by accident? And what is the fair result of the doctor's opinions on the view of the body? All these things concur to fix the murder on the man who left the yard in the morning. If you believe that was Frank Knapp; if you can say on your oaths that Savary's testimony satisfies you of it beyond a reasonable doubt, be it so—but it will satisfy nobody else. I have no fear of it.

There remains, then, only the supposition that the murder was committed at half past 10; and then the question is, Was the prisoner the man in Brown street? And on this point we have the most deplorable examples of the fallibility of human testimony, and of the weak stand that even common integrity can make against the overwhelming current of popular opinion. The witnesses are four. Webster and Southwick swore the same on both trials; Bray and Myrick have varied most essentially. As it now stands, Myrick and Webster are of little importance; Myrick saw a man in a frock coat who he now thinks was the prisoner, standing at the corner of Brown and Newbury streets from twenty minutes before to twenty minutes after 9. The man appeared to be waiting for someone; and when any person approached his post he walked away and then turned and met him; he did this several times. Now, whether that was or was not the prisoner is not in itself of any importance. It is hardly to be believed that a man who was to be engaged in a murder at half past 10 would be seen lingering near the spot for forty minutes at the early hour of nine. It would, if true, be no unfavorable circumstance. For what purpose connected with the murder was he there at that hour? Did the murderers take their measures so ill that one was on the watch for the other in a public corner near the scene of the murder an hour and a half before the time? Besides, where are the persons whom Myrick saw meet the prisoner at the corner? He spoke of several. Why are they not found and produced? It is impossible they should not be found. We have been loudly and gravely called upon to produce the man in Brown street if Frank Knapp was not he.

It is thought very strange that if it were not he, some friend of justice should not come forward and own himself to be the man, at the risk of taking the prisoner's place at the bar as a principal in the murder. So, too, it was asked, if Richard Crowninshield was not the man that joined him in Brown street, why don't the prisoner show where Richard was? And yet we are told that the prisoner stood half an hour at a corner, and was met by various persons, but not one of those

persons is produced to prove it. When it is the very question, whether it was the prisoner or not, and Myrick tells you himself that others saw him where they certainly would have recognized him. Now, it is a principle of law that no evidence is good, which of itself supposes better in existence, not produced. Myrick's evidence, then, is good for nothing, until those who met the prisoner at the post are produced. Besides, how did Myrick recognize him? He had never known him—he never knew him until he was brought up for trial—nearly four months after the night of the murder, and in a different dress. He was then told, by a bystander, which was Frank Knapp. Being asked at the first trial, who he thought the man at the corner was, he said he thought it was the prisoner, not from what he had observed, alone, but partly from what he had heard about him. Now, this was obviously no evidence at all. What a man thinks from what he hears, is nothing. What he hears is no evidence; and still less, what he thinks about it. But at this trial, Mr. Myrick makes another step; he says he thinks it was the prisoner, from his own observation alone, making allowance for the difference of dress. Now, how much of an allowance that is, depends on how much of the appearance of a man, seen four or five rods off by a perfect stranger, in a light, but cloudy evening, consists in his dress. It can consist of nothing but dress, figure and manner. Mr. Myrick's evidence, therefore, amounts to this and no more: "I think the prisoner's figure and manner the same as those of a man I saw four months ago, under the circumstances above described." This is so slight, that the difference in his testimony is not worth mentioning, except to show the growing tendency of the whole evidence.

About the time that Myrick leaves the prisoner in his frock, at the corner, Mr. Webster overtakes him in Howard street, in a wrapper. He passed him without much observation; he did not see his face, but he thinks it was the prisoner. It is of no consequence whether it was or not. The probability, from the change of dress, is that it was not. And this reminds me of a remark made on the last trial, that such differences and sudden changes of dress were to be expected for the pur-

poses of disguise when such business was on foot. With great deference to the learned counsel, it seems to me highly improbable. What is the evidence on this point? The prisoner is supposed to have had on his usual frock and cap, at the corner, from a quarter before to a quarter after 9; at half past 9 to have walked in Howard street, in the same cap and a wrapper; to have sitten on the steps of the rope walk in his own cap and camblet cloak at half past 10, and in five minutes after, to have been seen in the same street, in his frock. Now I agree with the learned counsel, that on such an occasion, disguise is to be expected; and farther, that it is entirely incredible anyone should go undisguised. But what disguise is here? The wrapper does not, indeed, correspond with any known dress of the prisoner; but in every other situation in which he is seen, he is recognized by his usual dress, and by that alone. Now, it is incredible enough that a man should, in a light evening, be out in his usual dress, to commit murder in his native town; but that he should think to disguise himself by putting on and off his own cloak, as well known as his own coat, and thus be seen in two of his habitual dresses, is a little too much to ask you to believe. Why not assume one effectual and complete disguise? Or, if he feared being seen too often in one dress, why not put a strange cloak over a strange coat? And why wear his own cap the whole evening? The counsel has said this was a murder planned with great skill—nothing could be more unskilful than the prisoner's part, if he was there.

But let us come to the more material part of this testimony. Mr. Southwick swears positively to having seen the prisoner on the rope-walk steps at half past 10, in his own cap and cloak—that he passed him three times, and watched him twenty minutes. He has known the prisoner from childhood. He did not speak, though he felt very suspicious of him. That he went into the house and took off his coat and came out again, and the man was gone. He met Mr. Bray, who pointed out a man standing at Shepard's post, on the other side of the street, in a frock and cap like the prisoner's. Bray and he stopped and observed him till he left Shepard's post, walked

down the opposite side of the street, and passed them and stood at the post under Bray's window. They then crossed over and entered Bray's house, passing within twenty feet of him. Southwick says he did not recognize the man in the frock coat, but supposed him to be the same he had seen on the steps, because there was no other persons in the street; and because he had the same suspicions of him! Now, this testimony of Mr. Southwick is open to two or three important objections. In the first place, if Frank Knapp were on the steps to aid in a murder, at that moment in execution, and expecting to be joined by the murderer, would he have permitted Southwick to pass him three times and watch him twenty minutes? He knew Southwick as well as Southwick knew him. Southwick says he dropped his head each time, as he passed him, so that he could not see his face. So there is a foolish bird that puts its head in a hole and thinks itself safe if it cannot see its pursuers. Murderers are apt to be more cautious. He says he knew it, then, to be Frank Knapp, and told his wife so. But though he thought the man he and Bray saw was the same, and both wondered what mischief he could be about, he never told Mr. Bray who he thought it was. Is that possible? Yet, both he and Bray agree in it. But the greatest impossibility of all is that he should not have recognized the prisoner, if it was he, in his usual dress, while walking down the opposite side of this narrow street. Chadwick tells you it was so light he easily distinguished Mr. Saltonstall, farther off, the same evening. Now, how inconsistent is this story with the supposition that that was the prisoner. He knew Frank Knapp familiarly, he saw him and recognized him in his cloak on the steps—he saw a man on the opposite side of the street five minutes after who he, for some reason, not connected with his appearance, thought was the same; and yet, though that man wore the usual dress of the prisoner, and walked down the street by Southwick, when it was light enough to distinguish persons across the street, and though Southwick passed within twenty feet of him to go into Bray's house, he did not recognize him as the prisoner. Again, he thought the man in the frock was the

same as the man in the cloak; he knew the man in the cloak was Frank Knapp, yet he and Bray wondered who the man in the frock could be, and Southwick never thought of telling Bray it was Frank Knapp. Now, if Southwick's testimony were believed, it not only would prove that the prisoner was the man at the post, but it would prove almost conclusively that it was not. It is impossible that Southwick should not have known if it were he, and should not have told Bray if he knew him on the steps. Besides, Southwick is contradicted by Mr. Shillaber—he told Shillaber that “for ought he knew, the man in Brown street might be Richard Crowninshield, and Frank Knapp the other—he could not tell who they were.” And how does Southwick explain this? He says Mr. Shillaber's question was, “Might not the man that came from Newbury street be Richard Crowninshield?” A probable question, indeed, for Richard's counsel to ask! But one word more with Mr. Southwick—when Chase and Selman were indicted for this murder, he went before the Grand Jury as a witness at Ipswich—he there swore that the man he saw in Brown street was about the size and height of Selman, and said not one word about Frank Knapp! On this testimony, and that of Hatch, the convict, was Selman indicted and imprisoned as a felon eighty-five days; until another Grand Jury assembled, and as Hatch's oath was inadmissible, and Southwick has turned his testimony against Knapp, Selman was discharged. Now, when was there anything more abominable than this, except in form? It is not to be sure within the reach of the law, but how is it in conscience? He swears now that he then knew it was Frank Knapp; and yet he indirectly swore then that it was Selman, and what is the contemptible evasion by which he tries to escape! Why, that it is true that he was about the size of Selman, and he was not asked whether it was Frank Knapp! If he tells truth now, he knew then, that by one word of truth he could clear Selman of all suspicion of being in Brown street; and he wilfully suppressed that truth. Now, why is he a more credible witness than if he had been convicted of perjury? It is said he told his wife it was Frank Knapp.

She says so, and it may be true; but it is not the very best corroboration. It is not of one-half the weight of the fact that he did not tell it to Bray. Still that only goes to the identity of the man on the steps. It leaves the man at the post still nameless, and that is the important question. Southwick does not pretend to identify him. Besides, where was his cloak? It seems that Joseph Knapp left his cloak at Burns' stable in St. Peters' street, and it is suggested that Frank might have got there the one that he wore. But Southwick swears the cloak was a brown camblet and Joseph's is a plaid. Besides, how could he have gone to Burns' stable without meeting Bray, who came down St. Peters' street?

Now this, with the addition of a statement from Bray, that he could not tell who the man in Brown street was, though he was about the size and shape of the prisoner, and wore a cap and a full-skirted coat, such as the hatters and tailors say Frank Knapp and a hundred others wear, was absolutely all the evidence on the first trial that the prisoner was in Brown street. Two remarkable facts have happened since; one is that Mr. Bray, one of the most honest witnesses in the cause, has on this trial, to the same question, answered that he had no doubt the man he saw in Brown street was the prisoner. Now, I have no disposition to accuse Mr. Bray of any intentional misstatement or over-statement; but here is a direct and flat contradiction. One week he says, "I have seen the prisoner in jail and in court, and I cannot say he was the man in Brown street;" and the next week he says, "I have seen him in jail and in court, and I have no doubt he is the man." And I am interrupted to say that this is no contradiction. Let the gentleman reconcile it as he can; I do not misquote the witness; such is and such was his testimony. Nay, more; though he said that he had thought more of it since the last trial, and become more certain—a strange way of correcting an opinion formed on what was seen four months ago—he said, too, that when he first saw the prisoner in jail he recognized him by his dress and motions. Now, there is no reconciling these things, let them be explained as they may. Both cannot be true—which will you believe?

That he does or does not recognize him? Mr. Bray is one of the Committee of Vigilance—let that go for what it is worth, and no more. But which is most likely to be right?—his first testimony, the result of the reflection of three months, before he knew what would be the event of the trial, or that result connected by the revision of a week, when he knew that the first trial had failed on that very point? I repeat that I accuse Mr. Bray of no wrong. But I cannot acquit him of that subjection to the power of imagination which has brought others here, as honest as himself, to swear positively to things that never did and never could happen. We shall see that presently. We claim his first as his true testimony. He cannot say that it was the prisoner who was in Brown street. He did not know the prisoner until he saw him arrested on suspicion of this crime. He then went to see him to compare his appearance with that of the man he had seen in Brown street nearly two months before. Of what value is an opinion, formed under such circumstances? And which of his two statements would it be more safe for Mr. Bray to stand by? Can any man, with such means of judgment, say with propriety he has no doubt? The rest of Bray's testimony I need not repeat; I have already stated the substance of it in speaking of the time of the murder, and it is not material on this point.

The other, of the two remarkable facts which I have mentioned, is a most wholesome lesson as to the credibility of the testimony in this case, and of the value of circumstantial evidence. It is worth hours of argument, and peals of eloquence. It is a fact, a stubborn fact; and there is no explaining it, nor getting away from it. Miss Lydia Kimball and Miss Sanborn, two elderly respectable females, as credible persons as any that have testified, have, under the influence of the madness that seems to have possessed almost everybody in Salem, testified distinctly and positively to a thing as within their own knowledge, which is absolutely impossible. They both swore that on the morning after the murder, a person whom they did not know, brought into Capt. White's house an old cloak, and left it, saying, "This is my brother's

cloak." Miss Kimball can't say it was the prisoner who brought it, for neither of them knew him at that time, but Miss Sanborn thinks he had a cap on. And Miss Katherine Kimball says that Joseph Knapp afterwards took the cloak as his own. Now, here seemed to be confirmation strong. Here was the prisoner, driven by the folly that always attends guilt, carrying into the very house of the murder the disguise he had worn the night before. How perfectly this corresponded with the testimony of Burns that Joseph Knapp left his cloak at the stable, and with the suggestion of the counsel that Frank Knapp had gone there to get it as a disguise! How wonderful is the force of circumstantial evidence! Men may lie, but circumstances cannot! Now, what is the fact about that cloak? It was Joseph's cloak; Stratton, Stephen White's coachman, went out to Wenham with a chaise that morning to bring in Mrs. Beckford, and she brought that cloak in with her. Stratton left Mrs. Beckford at Joseph White's, but by accident carried the cloak to Stephen White's in the chaise. And he afterwards folded it up and carried it to Joseph White's house. He was the stranger with the cap, that did not say, "This is my brother's cloak"—for how could he say so? He knew it was Joseph Knapp's cloak. Now, what becomes of the truth of Miss Kimball's and Miss Sanborn's story, and of the force of circumstances? "Circumstances cannot lie"—but women, and men, too, that swear to them, may be mistaken—and, with the help of a heated imagination, and a few leading suggestions, may honestly invent the most outrageous fictions. Now, this was detected by mere accident. We questioned Lathrop about it—he did not know—but he said Stratton brought Mrs. Beckford in from Wenham. We called for Stratton—he was not to be found—his examination was postponed until the prosecutors had put in their additional testimony. We called for him again, and then the whole matter was distinctly admitted. And this is the way that evidence is got up against the prisoner. And how much more of equally plausible testimony might be explained away in like manner we shall never know. Not a single fact in the cause is better vouched

than this—few so well; and yet the only material part of it is utterly false.

Now, take Bray and Southwick, the only material witnesses; make what allowances for error you think ought to be made, and can you say you are satisfied that the prisoner was in Brown street?

There is one more piece of evidence that may apply to it; that that will bring me to an inquiry important for other reasons. I mean the testimony of Mr. Colman.

But let us first look for a few moments at the proof of the prisoner's alibi. It is applicable to two different times. The first between 7 and 10, and the second after 10. The first depends on the testimony of Page, Balch, Burchmore and Forrester. Now, Page says he knows it was Monday or Tuesday evening; he said on examination he knew it was not Saturday, because he came home from college that day, and spent the evening at home. Burchmore is positive it was on Tuesday; and though uncertain before, has since remembered that he told Wm. Pierce so the day or day but one after the murder. We offer Pierce as a witness to the fact. Balch and Forrester both strongly believe that it was on Tuesday, and all agree it was cloudy, though light, and Monday was fair and bright. Now, what is there against this? It is said they have expressed doubts and uncertainty heretofore. This is no contradiction; three of them give now only their belief; but it is a very strong one in all—Burchmore, however, is positive, and he gives a good reason for it—and good proof of his correctness. Here stands William Pierce ready to swear that Burchmore told him so the next day or the day after; we cannot examine him, and the prosecutors will not. We have a right, then, to take it as proved by Pierce. But it is said that on the evening spoken of, Frank said he had a horse from Osborne's, and none is charged on that evening, and one is charged on Saturday evening; and this is thought sufficient to overthrow the whole testimony. But he may have had a horse and not be charged with it—or he may have told a falsehood when he said he had one. You remember the purpose for which he said he was going

out of town; perhaps he chose to make a pretense of riding the better to conceal his motions; it all depends on the accuracy of Osborne's books; Osborne was not examined on that point. But, after all, it is of no importance, except to show that Myrick and Webster are mistaken, and they are not very material witnesses.

The other branch of the alibi is more important, because it embraces the supposed time of the murder. Capt. Knapp, the father, swears that he went home a few minutes before 10, and that Frank came in and went to bed a few minutes after. And there is a particularity about this account that marks it either as truth, or as wilful and cunning perjury; and Capt. Knapp's character is enough to shield him from such a charge. He says he commended Frank's return at the prescribed hour; that Frank asked him if he should bolt the door, and he said no, that Phippin was out; that Frank seeing him looking over his papers (for he failed the very night), asked if he should help him—then threw his cap on the window seat near his own hat, and went up to bed—Capt. Knapp sat up till after 1, and Phippen Knapp returned at that hour, and sat up the rest of the night. Samuel H. Knapp's evidence is that a few minutes after ten, the prisoner opened his chamber door, spoke to him, and then went into his own room; and nobody heard him leave the house afterwards. He came down to breakfast as usual in the morning. Now, this is impeached by testimony of certain conversations and statements of Capt. Knapp and Samuel H. Knapp. It is said Capt. Knapp told Shepard that Frank came home and went to bed before half past 10, "as Phippen told him"—if he said, as I told Phippen, that would corroborate instead of contradicting him. And it is said farther that he told Treadwell that he did not know what time Frank came home, but believed about the usual hour. And that Samuel H. Knapp told Webb he did not know at what time Frank came home. Now, these are not contradictions; and their apparent inconsistency depends wholly on the accuracy with which these conversations are remembered and reported. Of all kinds of evidence reports of conversations are the most uncertain. You have

seen in this very case, that neither counsel, nor the reporters, nor even the judges agree as to the words used by the witnesses on the last trial of this cause, only a week since—although the greatest attention was paid and careful notes were taken. Then what is the probability that accidental conversations which took place two or three months ago, can now be accurately stated? Which is most probable; that Capt. Knapp remembers the facts he states so circumstantially, or that Shepard and Treadwell remember his words? And he is confirmed by Phippen Knapp and Eliza Benjamin as far as they could know.

But there is one piece of evidence that meets all the deficiencies of this case with a wonderful felicity. Whatever the Government cannot otherwise prove, Mr. Colman swears the prisoner has confessed and nothing more. Of half an hour's conversation with the prisoner he cannot remember a word but what turns out to be indispensable to the case of the prosecution. I no more mean to accuse Mr. Colman of wilful misstatement than I do Mr. Bray, or Miss Kimball, or Miss Sanborn. But he is ten times as likely to be mistaken as either of them. The old cloak story was, until exploded, ten times more credible than Mr. Colman's account of the confession—the witnesses for ought we know are equally respectable in character, and the testimony intrinsically more probable. What but the contagion of an unexampled popular frenzy could have so deluded these women? They have not been more exposed to it than others. But Mr. Colman has been living in its focus and breathing its intoxicating air for months. No man in the community has been so much excited by this horrible event as Mr. Colman. No man has taken a more active part in inquiring into its mysteries. Shall he then claim an exemption from the power that has either prostrated the integrity or strangely confounded the memory of witnesses as credible as himself? He had visited Joseph's cell three times that very day before he went into Frank's, and at the last time, passed directly from one cell where he had received a full, verbal confession, to the other, where he now thinks he heard what he has testified. To a man so ex-

cited as he was, and to this day, here is ample cause for confusion and ~~misapprehension~~. The witness is a clergyman, and whatever credibility that office may claim for him, I am willing he should enjoy. In my mind it is no more than belongs to any man of honest reputation; and on one account something less, for I cannot think the clerical office so well fits a man to endure and resist the excitement to which the witness has been subjected, as a secular employment. It is the experience of the world, that clergymen, when they mingle in worldly business, are more powerfully acted upon by it than others. Now, every material word of his testimony is contradicted by Mr. N. P. Knapp, the prisoner's brother. He went into the cell with Mr. Colman, and must have heard all that was said; he had not been in Joseph's cell during any part of his confession, and was not therefore liable to any misunderstanding. His attention was early called to it by a dispute with Mr. Colman about the club, and by consultations with counsel for his brother's defense. He has always borne an unsuspected character. Mr. Colman himself testifies to the propriety of his conduct before the trial—he trusted him with the knowledge of the place where the club was hidden, and depended on his honor to remove this witness of his brother's guilt; and the trust was not betrayed. Now here stand two witnesses, equal in character, directly opposed to each other on a matter known only to themselves, and to the prisoner.

It is said Mr. Knapp is contradicted by Mr. Wheatland; that is, Mr. Wheatland swears that in casual conversations held some months ago, Mr. Knapp made statements to him contrary to what he now swears. I have already remarked on the value of this kind of evidence. It depends on the thing least of all to be depended on; the accuracy with which words are remembered. The change of a word changes the whole meaning. Make the case your own. Can you pretend to remember casual conversations held with your neighbors three months ago, so that you can now swear to them? And if they should now swear to the facts differently from your present recollection of those conversations, would you charge them

with perjury? Or do you think, if we had an investigating committee of twenty-seven, and the whole bar and population of Salem, looking up evidence for the prisoner, we could not find witnesses who have understood or misunderstood Mr. Colman to give accounts different from what he now swears to? With such means any man may be contradicted. But Mr. Wheatland candidly tells you on this trial, that he cannot speak with certainty as to these conversations, how-much related to what was said by Joseph, and how much to what was said by Frank. That once admitted, the whole force of the contradiction is gone.

Mr. Knapp cannot be mistaken about this matter. It is impossible that, after having employed counsel for the defense before the magistrate, and being busy in procuring counsel for the defense at the trial, and being himself a lawyer and understanding the danger of such evidence, he could have heard Frank confess away his life without remarking and remembering it. I say, confess away his life; for, though these confessions, if true, cannot harm him as principal, he was then chargeable as an accessory, and on such a charge they would have been fatal.

Mr. Colman, on the contrary, is most liable to be mistaken about it. Having had repeated conversations with Joseph, before and after, on the same subject, it would be wonderful if he could accurately report, as he undertakes to do, the very words of Frank. It would be wonderful if he could separate the substance of the interviews. He did not, as he says, expect to be called as a witness against Frank. Mr. Knapp did expect to be examined, because he had early intimation of Mr. Colman's mistake about the club. Now, take the contradiction of Mr. Knapp, such as it is by Wheatland, on the one hand, and Mr. Colman's liability to error on the other; put equal characters into the two scales, and which will preponderate? One must be wrong. It is unnecessary and would be wicked to charge either with perjury; but there is a mistake between them that no supposition can reconcile. If you are not already satisfied which was most liable to err, look at the intrinsic probabilities of the stories.

The prisoner is a young but not a timid man. You have seen enough of his bearing on this trial to judge whether he would be likely to be surprised into a confession, and he was not surprised, for he had been examined and had counsel. Mr. Colman was a perfect stranger to him, not even known by sight. Now one of these witnesses tells you that the prisoner disclosed his whole guilt to a perfect stranger at first sight, without reluctance or hesitation, in direct answers to as many questions, and without threat, promise or encouragement, while the other says, he only said it was hard that Joseph should make any confessions about *him*, but that he had nothing to confess and should stand his trial. Which of these things is the more probable? And is it probable that N. P. Knapp, a lawyer, who was then providing for the defense of his brother, should have permitted him to make these confessions without interfering? I have said that Mr. Colman had confessions of the exact facts which the case required, and no more. See how that is, and how probable it is. The prisoner makes no general confession; claims no right, and expresses no hope, to be admitted State's evidence. But to four distinct questions respecting the details of the murder, he gives four direct answers criminating himself. Now, what were those answers? That the murder was committed between 10 and 11—a fact as you have seen wholly without sufficient evidence, but all important to the case. That Richard Crowninshield was the actual murderer. A thing without the shadow of other proof, except that McGlue saw him the evening before near White's house, and looking away from it. That the club was hidden under a certain step of the Branch meeting-house—the only proof that the club had anything to do with the murder—and that the dirk was worked up at the factory—and lastly, that Frank was absent from home at the time—to fortify the Brown street evidence and destroy the alibi. And there is one fact about this last which deserves notice: Mr. Colman in giving his reasons for asking these questions, said he had heard that the friends of the prisoner said he was at home that night at the time of the murder. This is strong confirmation of the alibi, for Mr.

Colman had heard of it the second day after the arrest. But is it not remarkable that so little should be remembered of a half hour's conversation and that so very distinctly? Is it not remarkable that, finding Frank so communicative, Mr. Colman should not have gone on to verify Joseph's whole confession in the same way? He tells you he has Joseph's confession covering nine sheets of paper, and yet, though Frank answered so freely, he had the curiosity to ask him only these four questions. It is truly incredible.

Now, what improbability is there in N. P. Knapp's account of this interview? Not the least. He agrees with Mr. Colman, that Frank said it was hard that Joseph should confess, and he cannot positively swear that what Mr. Colman adds as to its being done for Joseph's benefit, did not follow, because he remembers the first part of the sentence, and he may have forgotten the rest. But he swears that, to the best of his belief, it was not so. As to the four questions and answers, he swears positively that no such things were said; because, if said, he must have remembered them. And is not this a perfectly proper distinction? His account, too, of the conversation with Mr. Colman, on the turnpike and in Central street, of the note to Mr. Stephen White, and of all the other circumstances relating to the subject, is perfectly consistent, natural and credible.

But what is the amount of all these confessions? If true, they prove, indeed, that he knew too much of this guilty deed. But they imply no presence at it; all, but his own absence from home, are facts that he might, and some that he must have learned afterwards from others. And what does the fact, that he was absent from home, prove? At most, it is but a circumstance corroborative of the Brown street evidence. He may have been there, or he may have been elsewhere. The form, indeed, in which we have the confession from Mr. Colman, might imply that he was absent, knowing of the deed. "I went home afterwards;" but, obviously, this all depends on the exactness with which the words are remembered. Suppose only a slight change, and the dialogue to run thus: "When was the murder committed?" "Between

10 and 11." "Were you at home then?" "No; I did not go home until after that time." Now, this would contradict the alibi, but would not contain any implication of his partaking in, or knowing of the murder at the time. And when an implication depends on such slight differences, it is no evidence at all. And I repeat, what is the probability, if any confessions were made, that they were made in the words now delivered, when Mr. Colman has forgotten both words and substance of all the rest of the conversation?

One point only remains; but it is the great and important one. Believe the prisoner—if you will believe anything on such testimony as Leighton's and Palmer's—a conspirator and a procurer of the murder—believe him in Brown street at half past 10, and that the murder was committed at that hour, against the manifest weight of all the evidence but the confession. Believe the confession, too, and the whole of it, improbable and contradicted as it is; and, whatever the prisoner may deserve in your moral judgment, he stands as clear of this indictment as a principal, present, aiding and abetting, as Joseph Knapp does, who was in bed at Wenham. And here, gentlemen, if you ever come to this part of the case, you are to be tried as well as the prisoner. He is to be tried for his life, and you for a character which will last as long as life. The time will come when this trial will be coolly and impartially examined. It is on record forever. The murmur of applause that will follow a verdict of guilty from the multitude that now surrounds you, will soon subside; and another and a more enduring voice will then inquire whether you have been faithful to the law, and to your oaths and consciences, or to the impatient cry of popular resentment. Remember one thing—the reasons for a conviction can never seem so strong to you as now, but if there are reasons for an acquittal on the law, they will gain strength in your minds every day of your life, though it may be too late to listen to them. Let us go back then to the acknowledged law of the case. No matter what the prisoner has done or agreed to do; if he was not at the moment when the murder was committed in a place where he could give actual immediate assistance,

and there for that purpose. It has indeed been contended that it is enough that the parties thought the place a proper one, for the purpose—such is not the law, but here it is the same thing—for how can you judge that they thought it a fit place, unless you yourselves think it so. It is the only criterion in this dark affair, of which you see, as it were, only the dial hand, and know not how it is moved or regulated.

Could the man in Brown street give that help to the murderer, without the hope of which, the murder would not have been committed? This is a question of fact for you to try on the evidence and the view. You must be satisfied of this beyond any reasonable doubt, or your verdict of guilty will be against yourselves. Now, what assistance did the case admit? It was a secret assassination. If the prisoner had been actually present in the room or in the house, that alone would be enough. The mode of assistance would then be obvious. It would have been the part of the accomplice to beat down the strong old man, if he waked before the fatal blow; to murder any one of the inmates who should approach the chamber—give an alarm, or intercept the retreat. But when you find but one accomplice, and him at a distance in another street, you must inquire why he was there. You must be satisfied that he was posted there with some power, and therefore with the purpose, to aid. It becomes material to inquire particularly what aid he could afford. The late lamented Chief Justice, in his charge which has been read to you, delivered with special reference to the facts of this case, says, if he was there to prevent relief to the victim, to give an alarm to the murderer, or to assist him to escape, then he was present aiding and abetting. These are the only modes of assistance which occurred to him, or which can be imagined by anybody. What other aid could the murderer have anticipated? Of what other aid did the crime admit? Let us examine the place and the evidence with reference to these and see if either is possible. Was he there to intercept relief? If so, he would have taken a post where he could be aware of its approach. But did he so? It is said the murderer entered the house at half past 10. At that hour and for twenty min-

utes after, the prisoner is said to have been sitting wrapped in a cloak on the steps of the rope walk, not watching others, but hiding his own head from observation. From that time until five minutes before he was joined by the murderer, he was still farther off, leaning on a post at Shepard's house. How could he know whether relief was approaching or not? He could not see the house from any one spot where he was seen that evening. Anyone who passed him would have to turn two corners before he would be near White's house. Now he could see nothing but Brown street and nobody but those who passed through it. If anyone passed there, what was he to do? Was to knock him down, upon the possibility that he might be going to turn into Newbury street, and then might turn into Essex street, and then might go up that street towards White's house? On such a possibility was he to protect the murderer by an act that would infallibly create alarm to no purpose? The supposition is absurd. He could not intercept relief, because he was not where he could be aware of it. Could he give an alarm? An alarm of what? You see that he could not know of the approach of danger. If the enterprise had failed, Richard might have been discovered, overpowered and removed, before his accomplice could have been aware of any difficulty. But if it had been his object to intercept relief, or to give an alarm if he could not intercept it, where would he have been? At that point from which relief might be feared, and where early and certain intelligence of it might be had. Where was that? Certainly in Essex street. Who would come to the relief? The inmates of Capt. White's own house or of the adjoining houses of Deland and Gardner, or of the opposite houses, or some casual passenger. Now, against all these, the post of observation was in Essex street, and near the house. Or if he wanted to watch the adjoining streets, why not stand at the corner of Newbury street? Why not anywhere but at the places where he was seen during the whole time?

But one thing remains. Could he in Brown street help the murderer to escape? If he had been waiting with a swift horse, to convey him away, that might do. But one man on

foot can no more help another to run away, than one can help another to keep a secret. One could only embarrass and expose the other. Was he then to defend him in his flight? Resistance was not to be depended on or expected; besides, the accomplice was unarmed, and of what avail would he have been in Brown street, where no force could be expected, unless the alarm had become general. (Much of this argument consisted of reference to the plans and cannot be reported.) Now, we call on the prosecutors to satisfy you of some one mode in which aid could be afforded. On the former trial two ways only were suggested. First, that Richard might have gone into the garden early in the evening, and waited for a signal from Frank in Brown street to indicate the time when the lights were extinguished in Capt. White's house. And, second, that Frank was in Brown street to see that the coast was clear in Howard street, that Richard might go there to hide the club. Now these things, absurd as they seem, were really said and insisted on. And they are the best hypotheses that the best of counsel can make for the government. We want no better proof of the utter weakness of the point. If Richard was in the garden under the very windows, would he want Frank to tell him when the lights were put out? He could have watched every inmate of the house to his bed—he could have traced every light up the stairs until they were extinguished in the chambers. He could have heard every noise, and know when it ceased in the sleep of those within. As to Frank's watching Howard street, it would be enough to say that he was watched all the time, and that he did not once look down Howard street. Frank had been standing from five to ten minutes at Bray's post where he could not see a foot into Howard street, and then Richard having finished his conference, without any caution or examination started and ran into that street with the speed of a deer. Did this look like watching? And for what purpose was Howard street to be watched? That Richard might hide his club in a particular place selected—a club that nobody had ever seen and that could not be traced to him if found.

For what purpose, then, was the man in Brown street? We

are not bound to prove or to guess. But if it was the prisoner, and if the stories of the plot are true, he might have been there to know in season whether the enterprise had succeeded; its failure might have been most material to be known to the contrivers before inquiry had gone far. If plunder was expected he might have been there to share it. Neither of these things would make him a principal, for neither would be aiding at the time.

And now, gentlemen, as the last question in this cause, you are to say on your consciences, are you satisfied beyond a reasonable doubt that the man in Brown street, whoever he was, could have given any effectual aid in the actual commission of the murder, and selected that as the most proper place for that purpose. If you doubt about that upon the whole evidence, do your duty, and acquit the prisoner; such is the law, let it answer for its own deficiencies, if it be deficient, and trust that those who have the power will amend it, if it needs amendment.

Gentlemen of the jury, these are the prisoner's last words; his counsel have done and said all that they have found to do and say in his behalf. The rest is for the government, the Court, and for you. You are to be assailed with a powerful argument by the learned counsel who is to follow me. Admire the eloquence—admire the reasoning—but yield nothing to it but admiration, unless it convinces your understandings that the evidence you have heard, without regard to anything said or written elsewhere, ought to satisfy you of the fact that the prisoner was where he could aid in this murder, and by such presence did aid in it.

The prisoner is very young to be placed at the bar for such a crime. But, young as he is, I ask no mercy for him beyond the law. For every favorable consideration and sympathy consistent with the law, I would urge upon you his youth, his afflicted family, and the seductions of the evil example of others. By these and all good motives, I would urge you not to sacrifice him against law, that those more guilty than himself may be reached through him. His life is in your hands in the hands of each one of you. May you and each

of you give no verdict and consent to none, but such as your hearts can approve now and forever.

DANIEL WEBSTER, FOR THE COMMONWEALTH.

Mr. Webster. I am little accustomed, gentlemen, to the part which I am now attempting to perform. Hardly more than once or twice, has it happened to me to be concerned, on the side of the government, in any criminal prosecution whatever; and never, until the present occasion, in any case affecting life.

But I very much regret that it should have been thought necessary to suggest to you, that I am brought here to "hurry you against the law, and beyond the evidence." I hope I have too much regard for justice, and too much respect for my own character to attempt either; and were I to make such attempt, I am sure, that in this Court, nothing can be carried against the law, and that gentlemen, intelligent and just as you are, are not, by any power, to be hurried beyond the evidence. Though I could well have wished to shun this occasion, I have not felt at liberty to withhold my professional assistance, when it is supposed that I might be in some degree useful, in investigating and discussing the truth, respecting this most extraordinary murder. It has seemed to be a duty, incumbent on me, as on every other citizen, to do my best, and my utmost, to bring to light the perpetrators of this crime. Against the prisoner at the bar, as an individual, I cannot have the slightest prejudice. I would not do him the smallest injury or injustice. But I do not affect to be indifferent to the discovery, and the punishment of this deep guilt. I cheerfully share in the opprobrium, how much soever it may be, which is cast on those who feel and manifest an anxious concern that all who had a part in planning, or a hand in executing this deed of midnight assassination, may be brought to answer for their enormous crime, at the bar of public justice. Gentlemen, it is a most extraordinary case. In some respects, it has hardly a precedent anywhere; certainly none in our New England history. This bloody drama exhibited no suddenly excited, ungovernable rage.

The actors in it were not surprised by any lion-like temptation springing upon their virtue, and overcoming it, before resistance could begin. Nor did they do the deed to glut savage vengeance, or satiate long-settled and deadly hate. It was a cool, calculating, money-making murder. It was all "hire and salary, not revenge." It was the weighing of money against life; the counting out of so many pieces of silver, against so many ounces of blood.

An aged man, without an enemy in the world, in his own house, and in his own bed, is made the victim of a butcherly murder, for mere pay. Truly, here is a new lesson for painters and poets. Whoever shall hereafter draw the portrait of murder, if he will show it as it has been exhibited in an example, where such example was last to have been looked for, in the very bosom of our New England society, let him not give it the grim visage of Moloch, the brow knitted by revenge, the face black with settled hate, and the blood-shot eye emitting livid fires of malice. Let him draw, rather, a decorous, smooth-faced, bloodless demon; a picture in repose, rather than in action; not so much an example of human nature in its depravity, and in its paroxysms of crime, as an infernal being, a fiend in the ordinary display and development of his character.

The deed was executed with a degree of self-possession and steadiness equal to the wickedness with which it was planned. The circumstances, now clearly in evidence, spread out the whole scene before us. Deep sleep had fallen on the destined victim, and on all beneath his roof. A healthful old man, to whom sleep was sweet, the first sound slumbers of the night held him in their soft but strong embrace. The assassin enters, through the window already prepared, into an unoccupied apartment. With noiseless foot he paces the lonely hall, half lighted by the moon; he winds up the ascent of the stairs, and reaches the door of the chamber. Of this he moves the lock, by soft and continued pressure, till it turns on its hinges; and he enters, and beholds his victim before him. The room is uncommonly open to the admission of light. The face of the innocent sleeper is turned from the mur-

derer, and the beams of the moon, resting on the gray locks of his aged temple, show him where to strike. The fatal blow is given! and the victim passes, without a struggle or a motion, from the repose of sleep to the repose of death! It is the assassin's purpose to make sure work, and he yet plies the dagger, though it was obvious that life had been destroyed by the blow of the bludgeon. He even raises the aged arm, that he may not fail in his aim at the heart, and replaces it again over the wounds of the poignard! To finish the picture, he explores the wrist for the pulse! he feels it, and ascertains that it beats no longer! It is accomplished. The deed is done. He retreats, retraces his steps to the window, passes out through it, as he came in, and escapes. He has done the murder—no eye has seen him, no ear has heard him. The secret is his own, and it is safe!

Ah! gentlemen, that was a dreadful mistake. Such a secret can be safe nowhere. The whole creation of God has neither nook nor corner, where the guilty can bestow it, and say it is safe. Not to speak of that eye which glances through all disguises, and beholds everything, as in the splendor of noon, such secrets of guilt are never safe from detection, even by men. True it is, generally speaking, that "murder will out." True it is, that Providence hath so ordained, and doth so govern things, that those who break the great law of heaven, by shedding man's blood, seldom succeed in avoiding discovery. Especially, in a case exciting so much attention as this, discovery must come, and will come, sooner or later. A thousand eyes turn at once to explore every man, every thing, every circumstance, connected with the time and place; a thousand ears catch every whisper; a thousand excited minds intensely dwell on the scene, shedding all their light, and ready to kindle the slightest circumstance into a blaze of discovery. Meantime the guilty soul cannot keep its own secret. It is false to itself; or rather it feels an irresistible impulse of conscience to be true to itself. It labors under its guilty possession, and knows not what to do with it. The human heart was not made for the residence of such an inhabitant. It finds itself preyed on by a torment which it does not ac-

knowledge to God nor man. A vulture is devouring it, and it can ask no sympathy or assistance, either from heaven or earth. The secret which the murderer possesses soon comes to possess him; and, like the evil spirits of which we read, it overcomes him, and leads him whithersoever it will. He feels it beating at his heart, rising to his throat, and demanding disclosure. He thinks the whole world sees it in his face, reads it in his eyes, and almost hears its workings in the very silence of his thoughts. It has become his master. It betrays his discretion, it breaks down his courage, it conquers his prudence. When suspicions, from without, begin to embarrass him, and the net of circumstance to entangle him, the fatal secret struggles with still greater violence to burst forth. It must be confessed, it will be confessed; there is no refuge from confession but suicide, and suicide is confession.

Much has been said, on this occasion, of the excitement which has existed, and still exists, and of the extraordinary measures taken to discover and punish the guilty. No doubt, there has been, and is, much excitement, and strange indeed were it, had it been otherwise. Should not all the peaceable and well disposed naturally feel concerned, and naturally exert themselves to bring to punishment the authors of this secret assassination? Was it a thing to be slept upon or forgotten? Did you, gentlemen, sleep quite as quietly in your beds after this murder as before? Was it not a case for rewards, for meetings, for committees, for the united efforts of all the good, to find out a band of murderous conspirators, of midnight ruffians, and to bring them to the bar of justice and law? If this be excitement, is it an unnatural, or an improper excitement?

It seems to me, gentlemen, that there are appearances of another feeling of a very different nature and character, not very extensive, I would hope, but still there is too much evidence of its existence. Such is human nature, that some persons lose their abhorrence of crime, in their admiration of its magnificent exhibitions. Ordinary vice is reprobated by them, but extraordinary guilt, exquisite wickedness, the high flights and poetry of crime, seize on the imagination, and lead them

to forget the depths of the guilt, in admiration of the excellence of the performance, or the unequalled atrocity of the purpose. There are those in our day, who have made great use of this infirmity of our nature; and by means of it done infinite injury to the cause of good morals. They have affected not only the taste, but I fear also the principles of the young, the heedless, and the imaginative, by the exhibition of interesting and beautiful monsters. They render depravity attractive, sometimes by the polish of its manners, and sometimes by its very extravagance; and study to show off crime under all the advantages of cleverness and dexterity. Gentlemen, this is an extraordinary murder—but it is still a murder. We are not to lose ourselves in wonder at its origin, or in gazing on its cool and skillful execution. We are to detect and to punish it; and while we proceed with caution against the prisoner, and are to be sure that we do not visit on his head the offenses of others, we are yet to consider that we are dealing with a case of most atrocious crime, which has not the slightest circumstance about it to soften its enormity. It is murder, deliberate, concerted, malicious murder.

Although the interest in this case may have diminished by the repeated investigation of the facts; still, the additional labor which it imposes upon all concerned is not to be regretted, if it should result in removing all doubts of the guilt of the prisoner.

The learned counsel for the prisoner has said, truly, that it is your individual duty to judge the prisoner—that it is your individual duty to determine his guilt or innocence—and that you are to weigh the testimony with candor and fairness. But much at the same time has been said, which, although it would seem to have no distinct bearing on the trial, cannot be passed over without some notice.

A tone of complaint so peculiar has been indulged, as would almost lead us to doubt whether the prisoner at the bar, or the managers of this prosecution, are now on trial. Great pains have been taken to complain of the manner of the prosecution. We hear of getting up a case—of setting in motion trains of machinery—of foul testimony—of combinations to

overwhelm the prisoner—of private prosecutors—that the prisoner is hunted, persecuted, driven to his trial—that everybody is against him—and various other complaints, as if those who would bring to punishment the authors of this murder were almost as bad as they who committed it.

In the course of my whole life, I have never heard before, so much said about the particular counsel who happen to be employed. As if it were extraordinary, that other counsel than the usual officers of the government should be assisting in the conducting of a case on the part of the government. In one of the last capital trials in this county, that of Jackman for the Goodridge robbery (so-called), I remember that the learned head of the Suffolk bar, Mr. Prescott, came down in aid of officers of the government. This was regarded as neither strange nor improper. The counsel for the prisoner, in that case, contented themselves with answering his arguments, as far as they were able, instead of carping at his presence.

Complaint is made that rewards were offered, in this case, and temptations held out to obtain testimony. Are not rewards always offered, when great and secret offenses are committed? Rewards were offered in the case to which I alluded; and every other means taken to discover the offenders that ingenuity, or the most persevering vigilance could suggest. The learned counsel have suffered their zeal to lead them into a strain of complaint, at the manner in which the perpetrators of this crime were detected, almost indicating that they regard it as a positive injury, to them, to have found out their guilt. Since no man witnessed it, since they do not now confess it, attempts to discover it are half esteemed as officious intermeddling and impertinent inquiry.

It is said, that here even a Committee of Vigilance was appointed. This is a subject of reiterated remark. This committee are pointed at, as though they had been officiously intermeddling with the administration of justice. They are said to have been “laboring for months” against the prisoner. Gentlemen, what must we do in such a case? Are people to be dumb and still, through fear of overdoing? Is it come to

this, that an effort cannot be made, a hand cannot be lifted to discover the guilty, without its being said there is a combination to overwhelm innocence? Has the community lost all moral sense? Certainly a community that would not be roused to action, upon an occasion such as this was, a community which should not deny sleep to their eyes, and slumber to their eyelids, till they had exhausted all the means of discovery and detection, must, indeed, be lost to all moral sense, and would scarcely deserve protection from the laws. The learned counsel have endeavored to persuade you that there exists a prejudice against the persons accused of this murder. They would have you understand that it is not confined to this vicinity alone—but that even the legislature have caught this spirit, that through the procurement of the gentleman, here styled private prosecutor, who is a member of the senate, a special session of this court was appointed for the trial of these offenders; that the ordinary movements of the wheels of justice were too slow for the purposes devised. But does not everybody see and know that it was matter of absolute necessity to have a special session of the court? When, or how could the prisoners have been tried without a special session? In the ordinary arrangement of the courts, but one week in a year is allotted for the whole court to sit in this county. In the trial of all capital offenses a majority of the court, at least, are required to be present. In the trial of the present case alone, three weeks have already been taken up. Without such special session, then, three years would not have been sufficient for the purpose. It is answer sufficient to all complaints on this subject to say that the law was drawn by the late Chief Justice himself, to enable the courts to accomplish its duties; and to afford the persons accused an opportunity for trial without delay.

Again, it is said, that it was not thought of making Francis Knapp, the prisoner at the bar, a principal till after the death of Richard Crowninshield, Jr.; that the present indictment is an afterthought—that “testimony was got up” for the occasion. It is not so. There is no authority for this suggestion. The case of the Knapps had not then been before the

Grand Jury. The officers of the government did not know what the testimony would be against them. They could not therefore have determined what course they should pursue. They intended to arraign all as principals who should appear to have been principals; and all as accessories who should appear to have been accessories. All this could be known only when the evidence should be produced.

But the learned counsel for the defendant take a somewhat loftier flight still. They are more concerned, they assure us, for the law itself, than even for their client. Your decision in this case, they say, will stand as a precedent. Gentlemen, we hope it will. We hope it will be a precedent, both of candor and intelligence, of fairness and firmness; a precedent of good sense and honest purpose, pursuing their investigation discreetly, rejecting loose generalities exploring all the circumstances, weighing each, in search of truth, and embracing and declaring the truth, when found.

It is said that "laws are made, not for the punishment of the guilty, but for the protection of the innocent." This is not quite accurate, perhaps, but if so, we hope they will be so administered as to give that protection. But who are the innocent, whom the law would protect? Gentlemen, Joseph White was innocent. They are innocent who, having lived in fear of God, through the day, wish to sleep in His peace through the night, in their own beds. The law is established that those who live quietly may sleep quietly; that they who do no harm may feel none. The gentleman can think of none that are innocent, except the prisoner at the bar, not yet convicted. Is a proved conspirator to murder innocent? Are the Crowninshields and the Knapps innocent? What is innocence? How deep stained with blood—how reckless in crime—how deep in depravity, may it be, and yet remain innocence? The law is made, if we would speak with entire accuracy, to protect the innocent, by punishing the guilty. But there are those innocent, out of court as well as in—innocent

citizens not suspected of crime, as well as innocent prisoners at the bar.

The criminal law is not founded in a principle of vengeance. It does not punish, that it may inflict suffering. The humanity of the law feels and regrets, every pain it causes, every hour of restraint it imposes, and more deeply still, every life it forfeits. But it uses evil, as the means of preventing greater evil. It seeks to deter from crime, by the example of punishment. This is its true, and only true main object. It restrains the liberty of the few offenders, that the many who do not offend, may enjoy their own liberty. It forfeits the life of the murderer, that other murders may not be committed. The law might open the jails, and at once set free all persons accused of offenses, and it ought to do so, if it could be made certain that no other offenses would hereafter be committed, because it punishes, not to satisfy any desire to inflict pain, but simply to prevent the repetition of crimes. When the guilty, therefore, are not punished, the law has, so far, failed of its purpose; the safety of the innocent is, so far, endangered. Every unpunished murder takes away something from the security of every man's life. And whenever a jury, through whimsical and ill-founded scruples, suffer the guilty to escape, they make themselves answerable for the augmented danger of the innocent.

We wish nothing to be strained against this defendant. Why, then, all this alarm? Why all this complaint against the manner in which the crime is discovered? The prisoner's counsel catch at supposed flaws of evidence, or bad character of witnesses, without meeting the case. Do they mean to deny the conspiracy? Do they mean to deny that the two Crowninshields and the two Knapps were conspirators? Why do they rail against Palmer, while they do not disprove, and hardly dispute the truth of any one fact sworn to by him? Instead of this, it is made matter of sentimentality, that Palmer has been prevailed upon to betray his bosom companions, and to violate the sanctity of friendship. Again, I ask, why do they not meet the case? If the fact is out, why

not meet it? Do they mean to deny that Capt. White is dead? One would have almost supposed even that from some remarks that have been made. Do they mean to deny the conspiracy? Or, admitting a conspiracy, do they mean to deny only that Frank Knapp, the prisoner at the bar, was abetting in the murder, being present, and so deny that he was a principal? If a conspiracy is proved, it bears closely upon every subsequent subject of inquiry. Why do they not come to the fact? Here the defense is wholly indistinct. The counsel neither take the ground, nor abandon it. They neither fly, nor light; they hover. But they must come to a closer mode of contest. They must meet the facts, and either deny or admit them. Had the prisoner at the bar, then, a knowledge of this conspiracy or not? This is the question. Instead of laying out their strength in complaining of the manner in which the deed is discovered—of the extraordinary pains taken to bring the prisoner's guilt to light—would it not be better to show there was no guilt? Would it not be better to show that he had committed no crime? They say, and they complain, that the community feel a great desire that he should be punished for his crimes—would it not be better to convince you that he has committed no crime?

Gentlemen, let us now come to the case. Your first inquiry, on the evidence, will be: Was Captain White murdered in pursuance of a conspiracy, and was the defendant one of this conspiracy? If so, the second inquiry is, was he so connected with the murder itself as that he is liable to be convicted as a principal? The defendant is indicted as a principal. If not guilty as such, you cannot convict him. The indictment contains three distinct classes of counts. In the first, he is charged as having done the deed, with his own hand; in the second, as an aider and abettor to Richard Crowninshield, Jr., who did the deed; in the third, as an aider and abettor to some person unknown. If you believe him guilty on either of these counts, or in either of these ways, you must convict him.

It may be proper to say, as a preliminary remark, that there are two remarkable circumstances attending this trial. One

is, that Richard Crowninshield, Jr., the supposed immediate perpetrator of the murder, since his arrest, has committed suicide. He has gone to answer before a tribunal of perfect infallibility. The other is, that Joseph Knapp, the supposed origin and planner of the murder, having once made a full disclosure of the facts, under a promise of indemnity, is, nevertheless, not now a witness. Notwithstanding his disclosure, and his promise of indemnity, he now refuses to testify. He chooses to return to his original state, and now stands answerable himself, when the time shall come for his trial. These circumstances it is fit you should remember, in your investigation of the case.

Your decision may affect more than the life of this defendant. If he be not convicted as principal, no one can be. Nor can anyone be convicted of a participation in the crime as accessory. The Knapps and George Crowninshield will be again on the community. This shows the importance of the duty you have to perform; and to remind you of the degree of care and wisdom necessary to be exercised in its performance. But certainly these considerations do not render the prisoner's guilt any clearer, nor enhance the weight of the evidence against him. No one desires you to regard consequences in that light. No one wishes anything to be strained, or too far pressed against the prisoner. Still, it is fit you should see the full importance of the duty devolved upon you.

And now, gentlemen, in examining this evidence, let us begin at the beginning, and see first what we know independent of the disputed testimony. This is a case of circumstantial evidence; and these circumstances, we think, are full and satisfactory. The case mainly depends upon them, and it is common that offenses of this kind must be proved in this way. Midnight assassins take no witnesses. The evidence of the facts relied on has been, somewhat sneeringly denominated by the learned counsel, "circumstantial stuff," but, it is not such stuff as dreams are made of. Why does he not rend this stuff? Why does he not tear it away, with the crush of his hand. He dismisses it, a little too summa-

rily. It shall be my business to examine this stuff and try its cohesion.

The letter from Palmer at Belfast, is that no more than flimsy stuff?

The fabricated letters, from Knapp to the committee, and Mr. White, are they nothing but stuff?

The circumstance that the housekeeper was away at the time the murder was committed, as it was agreed she would be, is that, too, a useless piece of the same stuff?

The facts that the key of the chamber door was taken out and secreted; that the window was unbarred and unbolted; are these to be so slightly and so easily disposed of?

It is necessary, gentlemen, now to settle, at the commencement the great question of a conspiracy. If there was none, or the defendant was not a party, then there is no evidence here to convict him. If there was a conspiracy and he is proved to have been a party, then these two facts have a strong bearing on others and all the great points of inquiry. The defendant's counsel take no distinct ground, as I have already said, on this point, either to admit, or to deny. They choose to confine themselves to a hypothetical mode of speech. They say, supposing there was a conspiracy, *non sequitur*, that the prisoner is guilty, as principal. Be it so. But still, if there was a conspiracy, and if he was a conspirator, and helped to plan the murder, this may shed much light on the evidence, which goes to charge him with the execution of that plan.

We mean to make out the conspiracy; and that the defendant was a party to it; and then to draw all just inferences from these facts.

Let me ask your attention, then, in the first place, to those appearances, on the morning after the murder, which have a tendency to show that it was done in pursuance of a pre-concerted plan of operation. What are they? A man was found murdered in his bed. No stranger had done the deed—no one unacquainted with the house had done it. It was apparent that somebody from within had opened, and somebody from without had entered. There had been there, ob-

viously and certainly, concert and co-operation. The inmates of the house were not alarmed when the murder was perpetrated. The assassin had entered, without any riot, or any violence. He had found the way prepared before him. The house had been opened. The window was unbarred, from within, and its fastening unscrewed. There was a lock on the door of the chamber, in which Mr. White slept, but the key was gone. It had been taken away, and secreted. The footsteps of the murderer were visible, outdoors, tending toward the window. The plank by which he entered the window still remained. The road he pursued had been thus prepared for him. The victim was slain, and the murderer had escaped. Everything indicated that somebody from within had co-operated with somebody from without. Everything proclaimed that some of the inmates, or somebody having access to the house, had had a hand in the murder. On the face of the circumstances, it was apparent, therefore, that this was a premeditated, concerted, conspired murder; that there had been a conspiracy to commit it. Who, then, were the conspirators? If not now found out, we are still groping in the dark, and the whole tragedy is still a mystery.

If the Knapps and the Crowninshields were not the conspirators, in this murder, then there is a whole set of conspirators yet not discovered. Because, independent of the testimony of Palmer and Leighton, independent of all disputed evidence, we know, from uncontroverted facts, that this murder was, and must have been, the result of concert and co-operation, between two or more. We know it was not done without plan and deliberation; we see, that whoever entered the house, to strike the blow, was favored and aided by someone, who had been previously in the house, without suspicion, and who had prepared the way. This is concert, this is co-operation, this is conspiracy. If the Knapps and the Crowninshields, then, were not the conspirators, who were? Joseph Knapp had a motive to desire the death of Mr. White, and that motive has been shown.

He was connected by marriage with the family of Mr. White. His wife was the daughter of Mrs. Beckford, who was

the only child of a sister of the deceased. The deceased was more than eighty years old, and he had no children. His only heirs were nephews and nieces. He was supposed to be possessed of a very large fortune—which would have descended, by law, to his several nephews and nieces in equal shares, or, if there was a will, then according to the will. But as Captain White had but two branches of heirs—the children of his brother, Henry White, and of Mrs. Beckford—according to the common idea, each of these branches would have shared one-half of Mr. White's property.

This popular idea is not legally correct. But it is common, and very probably was entertained by the parties. According to this, Mrs. Beckford, on Mr. White's death, without a will, would have been entitled to one-half of Mr. White's ample fortune; and Joseph Knapp had married one of her three children. There was a will, and this will gave the bulk of the property to others; and we learn from Palmer that one part of the design was to destroy the will before the murder was committed. There had been a previous will, and that previous will was known or believed to have been more favorable than the other, to the Beckford family. So that by destroying the last will, and destroying the life of the testator at the same time, either the first and more favorable will would be set up, or the deceased would have no will, which would be, as was supposed, still more favorable. But the conspirators not having succeeded in obtaining and destroying the last will, though they accomplished murder, but the last will being found in existence and safe, and that will bequeathing the mass of the property to others, it seemed, at the time, impossible for Joseph Knapp, as for anyone else, indeed, but the principal devisee, to have any motive which should lead to the murder. The key, which unlocks the whole mystery, is the knowledge of the intention of the conspirators to steal the will. This is derived from Palmer, and it explains all. It solves the whole marvel. It shows the motive actuating those, against whom there is much evidence, but who, without the knowledge of this intention, were not seen to have had a motive. This intention is proved, as I have said, by

Palmer; and it is so congruous with all the rest of the case, it agrees so well with all facts and circumstances, that no man could well withhold his belief, though the facts were stated by a still less credible witness. If one, desirous of opening a lock, turns over and tries a bunch of keys till he finds one that will open it, he naturally supposes he has found the key of that lock. So in explaining circumstances of evidence, which are apparently irreconcilable, or unaccountable, if a fact be suggested, which at once accounts for all, and reconciles all, by whomsoever it may be stated, it is still difficult not to believe that such fact is the true fact belonging to the case. In this respect, Palmer's testimony is singularly confirmed. If it were false, then his ingenuity could not furnish us such clear exposition of strange-appearing circumstances. Some truth, not before known, can alone do that.

When we look back, then, to the state of things immediately on the discovery of the murder, we see that suspicion would naturally turn at once, not to the heirs-at-law, but to those principally benefited by the will. They, and they alone, would be supposed or seem to have a direct object, for wishing Mr. White's life to be terminated. And strange as it may seem, we find counsel now insisting, that if no apology, it is yet mitigation of the atrocity of the Knapp's conduct, in attempting to charge this foul murder on Mr. White, the nephew and principal devisee, that public suspicion was already so directed! As if assassination of character were excusable, in proportion as circumstances may render it easy. Their endeavors, when they knew they were suspected themselves, to fix the charge on others by foul means and by falsehood, is fair and strong proof of their own guilt. But more of that, hereafter.

The counsel say that they might safely admit that Richard Crowninshield, Jr., was the perpetrator of this murder.

But how could they safely admit that? If that were admitted, everything else would follow. For why should Richard Crowninshield, Jr., kill Mr. White? He was not his heir, nor his devisee; nor was he his enemy. What could be his motive? If Richard Crowninshield, Jr., killed Mr. White,

he did it at someone's procurement, who himself had a motive? And who, having any motive, is shown to have had any intercourse with Richard Crowninshield, Jr., but Joseph Knapp, and this, principally through the agency of the prisoner at the bar? It is the infirmity, the distressing difficulty of the prisoner's case, that his counsel cannot and dare not admit what they cannot disprove and what all must believe. He who believes, on this evidence, that Richard Crowninshield, Jr., was the immediate murderer, cannot doubt that both the Knapps were conspirators in that murder. The counsel therefore, are wrong, I think, in saying they might safely admit this. The admission of so important, and so connected a fact, would render it impossible to contend further against the proof of the entire conspiracy, as we state it.

What, then, was this conspiracy? J. J. Knapp, Jr., desirous of destroying the will, and of taking the life of the deceased, hired a ruffian who, with the aid of other ruffians, were to enter the house, and murder him, in his own bed.

As far back as January, this conspiracy began. Endicott testifies to a conversation with J. J. Knapp, at that time in which Knapp told him that Captain White had made a will, and given the principal part of his property to Stephen White. When asked how he knew, he said "Black and white don't lie." When asked if the will was not locked up, he said, "There is such a thing as two keys to the same lock." And, speaking of the then late illness of Captain White, he said that Stephen White would not have been sent for, if he had been there.

Hence, it appears, that as early as January, Knapp had a knowledge of the will, and that he had access to it, by means of false keys. This knowledge of the will, and an intent to destroy it, appear also from Palmer's testimony—a fact disclosed to him by the other conspirators. He says, that he was informed of this by the Crowninshields on the 2nd of April. But, then, it is said that Palmer is not to be credited—that by his own confession he is a felon—that he has been in the State prison in Maine—and above all, that he was an inmate and associate with these conspirators themselves. Let us

admit these facts. Let us admit him to be as bad as they would represent him to be; still, in law, he is a competent witness. How else are the secret designs of the wicked to be proved but by their wicked companions, to whom they have disclosed them? The government does not select its witnesses. The conspirators themselves have chosen Palmer. He was the confidant of the prisoners. The fact, however, does not depend on his testimony alone. It is corroborated by other proof, and taken in connection with the other circumstances, it has strong probability. In regard to the testimony of Palmer, generally, it may be said, that it is less contradicted, in all parts of it, either by himself or others, than that of any other material witness, and that everything he has told has been corroborated by other evidence, so far as it was susceptible of confirmation. An attempt has been made to impair his testimony, as to his being at the Half-Way House on the night of the murder; you have seen with what success. Mr. Babb is called to contradict him—you have seen how little he knows—and even that not certainly; for he, himself, is proved to have been in an error, by supposing him to have been at the Half-Way House on the evening of the 9th of April. At that time Palmer is proved to have been at Dustin's in Danvers. If, then, Palmer, bad as he is, has disclosed the secrets of the conspiracy, and has told the truth—there is no reason why it should not be believed. Truth is truth, come whence it may—though it were even from the bottom of the bottomless pit.

The facts show that this murder had been long in agitation—that it was not a new proposition on the 2nd of April—that it had been contemplated for five or six weeks before. R. Crowninshield was at Wenham in the latter part of March, as testified by Starrett. F. Knapp was at Danvers, in the latter part of February, as testified by Allen. R. Crowninshield inquired whether Captain Knapp was about home, when at Wenham. The probability is, that they would open the case to Palmer, as a new project. There are other circumstances that show it to have been some weeks in agitation. Palmer's testimony as to the transactions on the 2nd of

April is corroborated by Allen, and by Osborn's books. He says that F. Knapp came there in the afternoon—and again in the evening. So the book shows. He says that Captain White had gone out to his farm on that day. So others prove. How could this fact, or these facts, have been known to Palmer, unless F. Knapp had brought the knowledge? And was it not the special object of this visit, to give information of this fact, that they might meet him and execute their purpose on his return from his farm? The letter of Palmer, written at Belfast, has intrinsic evidence of genuineness. It was mailed at Belfast, May 13. It states facts that he could not have known, unless his testimony be true. This letter was not an afterthought; it is a genuine narrative. In fact, it says, "I know the business your brother Frank was transacting on the 2nd of April"—how could he have possibly known this, unless he had been there? The "\$1,000 that was to be paid"—where could he have obtained this knowledge? The testimony of Endicott, of Palmer, and these facts are to be taken together; and they, most clearly, show that the death of Captain White must have been caused by somebody interested in putting an end to his life.

As to the testimony of Leighton. As far as manner of testifying goes, he is a bad witness; but it does not follow from this that he is not to be believed. There are some strange things about him. It is strange, that he should make up a story against Captain Knapp, the person with whom he lived; that he never voluntarily told anything; all that he has said is screwed out of him. The story could not have been invented by him—his character for truth is unimpeached—and he intimated to another witness, soon after the murder happened, that he knew something he should not tell. There is not the least contradiction in his testimony—though he gives a poor account of withholding it. He says that he was extremely bothered by those who questioned him. In the main story that he relates, he is universally consistent with himself; some things are for him—and some against him. Examine the intrinsic probability of what he says. See if some allowance is not to be made for him, on account of his

ignorance of things of this kind. It is said to be extraordinary that he should have heard just so much of the conversation and no more; that he should have heard just what was necessary to be proved, and nothing else. Admit that this is extraordinary; still, this does not prove it not true. It is extraordinary, that you twelve gentlemen should be called upon out of all the men in the county, to decide this case; no one could have foretold this, three weeks since. It is extraordinary, that the first clue to this conspiracy, should have been derived from information given by the father of the prisoner at the bar; and in every case that comes to trial there are many things extraordinary—the murder itself in this case is an extraordinary one—but still we do not doubt its reality.

It is argued that this conversation between Joseph and Frank could not have been, as Leighton has testified, because they had been together for several hours before—this subject must have been uppermost in their minds—whereas, this appears to have been the commencement of their conversation upon it. Now, this depends altogether upon the tone and manner of the expression; upon the particular word in the sentence, which was emphatically spoken; if he had said, “When did you *see* Dick, Frank?”—this would not seem to be the beginning of the conversation. With what emphasis it was uttered, it is not possible to learn; and therefore nothing can be made of this argument. If this boy’s testimony stood alone, it should be received with caution. And the same may be said of the testimony of Palmer. But they do not stand alone. They furnish a clue to numerous other circumstances, which, when known, react in corroborating what would have been received with caution, until thus corroborated. How could Leighton have made up this conversation? “When did you see Dick?” “I saw him this morning.” “When is he going to kill the old man?” “I don’t know.” “Tell him if he don’t do it soon, I won’t pay him.” Here is a vast amount, in a few words. Had he wit enough to invent this? There is nothing so powerful as truth; and often nothing so strange. It is not even suggested that the

story was made for him. There is nothing so extraordinary in the whole matter, as it would have been for this country boy to have invented this story.

The acts of the parties themselves furnish strong presumption of their guilt. What was done on the receipt of the letter from Maine? This letter was signed by Charles Grant, Jr., a person not known to either of the Knapps—nor was it known to them, that any other person, beside the Crowninshields, knew of the conspiracy. This letter by the accidental omission of the word Jr. fell into the hands of the father, when intended for the son. The father carried it to Wenham, where both the sons were. They both read it. Fix your eye steadily on this part of the circumstantial stuff, which is in the case; and see what can be made of it. This was shown to the two brothers on Saturday, 15th of May. They, neither of them, knew Palmer. And if they had known him, they could not have known him to have been the writer of this letter. It was mysterious to them, how anyone, at Belfast, could have had knowledge of this affair. Their conscious guilt prevented due circumspection. They did not see the bearing of its publication. They advised their father to carry it to the Committee of Vigilance, and it was so carried. On Sunday following, Joseph began to think there might be something in it. Perhaps, in the meantime, he had seen one of the Crowninshields. He was apprehensive, that they might be suspected—he was anxious to turn attention from their family. What course did he adopt, to effect this? He addressed one letter, with a false name, to Mr. White, and another to the committee; and to complete the climax of his folly, he signed the letter addressed to the committee, “Grant”—the same name as that signed to the letter they then had from Belfast, addressed to Knapp. It was in the knowledge of the committee, that no person but the Knapps had seen this letter from Belfast; and that no other person knew its signature. It therefore must have been irresistibly plain, to them, that one of the Knapps must have been the writer of the letter they had received, charging the murder on Mr. White. Add to this the fact of its having been dated at Lynn,

and mailed at Salem, four days after it was dated, and who could doubt respecting it? Have you ever read, or known, of folly equal to this? Can you conceive of crime more odious and abominable? Merely to explain the apparent mysteries of the letter from Palmer, they excite the basest suspicions of a man, who, if they were innocent, they had no reason to believe guilty; and who, if they were guilty, they most certainly knew to be innocent. Could they have adopted a more direct method of exposing their own infamy? The letter to the committee has intrinsic marks of a knowledge of this transaction. It tells of the time, and the manner in which the murder was committed. Every line speaks the writer's condemnation. In attempting to divert attention from his family, and to charge the guilt upon another, he indelibly fixes it upon himself.

Joseph Knapp requested Allen to put these letters into the post office, because, said he, "I wish to nip this silly affair in the bud." If this were not the order of an overruling Providence, I should say that it was the silliest piece of folly that was ever practiced. Mark the destiny of crime. It is ever obliged to resort to such subterfuges; it trembles in the broad light; it betrays itself, in seeking concealment. He alone walks safely who walks uprightly. Who, for a moment, can read these letters and doubt of Joseph Knapp's guilt? The constitution of nature is made to inform against him. There is no corner dark enough to conceal him. There is no turnpike broad enough, or smooth enough, for a man so guilty to walk in without stumbling. Every step proclaims his secret to every passenger. His own acts come out, to fix his guilt. In attempting to charge another with his own crime, he writes his own confession. To do away with the effect of Palmer's letter, signed Grant, he writes his own letter and affixes to it the name of Grant. He writes in a disguised hand; but how could it happen, that the same Grant should be in Salem, that was at Belfast? This has brought the whole thing out. Evidently he did it, because he has adopted the same style. Evidently he did it, because he speaks of the price of blood, and

of other circumstances connected with the murder, that no one but a conspirator could have known.

Palmer says he made a visit to the Crowninshields on the 9th of April. George then asked him whether he had heard of the murder. Richard inquired whether he had heard the music at Salem. They said that they were suspected, that a committee had been appointed to search houses, and that they had melted up the dagger the day after the murder, because it would be a suspicious circumstance to have it found in their possession. Now, this committee was not appointed, in fact, until Friday evening. But this proves nothing against Palmer—it does not prove that George did not tell him so—it only proves that he gave a false reason, for a fact. They had heard that they were suspected—how could they have heard this, unless it were from the whisperings of their own consciences?—surely this rumor was not then public.

About the 27th of April, another attempt is made by the Knapps to give a direction to public suspicion. They reported themselves to have been robbed, in passing from Salem to Wenham, near Wenham pond. They came to Salem, and stated the particulars of the adventure. They described persons, their dress, size and appearance, who had been suspected of the murder. They would have it understood that the community was infested with a band of ruffians, and that they themselves were the particular objects of their vengeance. Now, this turns out to be all fictitious—all false. Can you conceive of anything more enormous—any wickedness greater, than the circulation of such reports, than the allegation of crimes, if committed, capital? If no such crime had been committed, it reacts, with double force upon themselves and goes very far to show their guilt. How did they conduct themselves on this occasion? Did they make hue and cry? Did they give information that they had been assaulted, that night at Wenham? No such thing. They rested quietly on that night—they waited to be called on for the particulars of their adventure—they made no attempt to arrest the offenders—this was not their object. They were content to fill the thousand mouths of rumor—to spread abroad false

reports—to divert the attention of the public from themselves—for they thought every man suspected them, because they knew they ought to be suspected.

The manner in which the compensation for this murder was paid, is a circumstance worthy of consideration. By examining the facts and dates, it will satisfactorily appear, that Joseph Knapp paid a sum of money to Richard Crowninshield in five-franc pieces on the 24th of April. On the 21st of April, Joseph Knapp received 500 five-franc pieces, as the proceeds of an adventure at sea. The remainder of this species of currency that came home in the vessel was deposited in a bank at Salem. On Saturday, 24th of April, Frank and Richard rode to Wenham. They were there with Joseph an hour or more—appeared to be negotiating private business—Richard continued in the chaise—Joseph came to the chaise and conversed with him. These facts are proved by Hart, and Leighton, and by Osborn's books. On Saturday evening, about this time, Richard Crowninshield is proved to have been at Wenham, with another person, whose appearance corresponds with Frank, by Lummus. Can anyone doubt this being the same evening? What had Richard Crowninshield to do at Wenham, with Joseph, unless it were this business? He was there before the murder—he was there after the murder—he was there clandestinely, unwilling to be seen. If it were not upon this business, let it be told what it was for—Joseph Knapp could explain it—Frank Knapp might explain it—but they do not explain it—and the inference is against them.

Immediately after this, Richard passes five-franc pieces; on the same evening one to Lummus, five to Palmer, and near this time George passes three or four in Salem. Here are nine of these pieces passed by them in four days. This is extraordinary. It is an unusual currency; in ordinary business, few men would pass nine such pieces in the course of a year. If they were not received in this way, why not explain how they came by them? Money was not so flush in their pockets that they could not tell whence it came,

if it honestly came there. It is extremely important to them to explain whence this money came, and they would do it if they could. If, then, the price of blood was paid at this time, in the presence and with the knowledge of this defendant, does not this prove him to have been connected with this conspiracy?

Observe, also, the effect on the mind of Richard, of Palmer's being arrested and committed to prison—the various efforts he makes to discover the fact, the lowering, through the crevices of the rock, the pencil and paper for him to write upon, the sending two lines of poetry, with the request that he would turn the corresponding lines, the shrill and peculiar whistle, the inimitable exclamations of “Palmer! Palmer! Palmer!”—all these things prove how great was his alarm; they corroborate Palmer's story, and tend to establish the conspiracy.

Joseph Knapp had a part to act in this matter; he must have opened the window and secreted the key; he had free access to every part of the house; he was accustomed to visit there; he went in and out at his pleasure; he could do this without being suspected. He is proved to have been there the Saturday preceding.

If all these things, taken in connection, do not prove that Captain White was murdered in pursuance of a conspiracy, then the case is at an end.

Savary's testimony is wholly unexpected. He was called for a different purpose. When asked who the person was, that he saw come out of Captain White's yard between three and four o'clock in the morning, he answered, Frank Knapp. I am not clear that this is not true. There may be many circumstances of importance connected with this; though we believe the murder to have been committed between 10 and 11 o'clock. The letter to Dr. Barstow states it to have been done about 11 o'clock—it states it to have been done with a blow on the head, from a weapon loaded with lead. Here is too great a correspondence with the reality, not to have some meaning to it. Dr. Peirson was always of the opinion

that the two classes of wounds were made with different instruments, and by different hands. It is possible that one class was inflicted at one time, and the other at another. It is possible that on the last visit the pulse might not have entirely ceased to beat, and then the finishing stroke was given. It is said, when the body was discovered, some of the wounds weeped, while the others did not. They may have been inflicted from mere wantonness. It was known that Captain White was accustomed to keep specie by him in his chamber. This, perhaps, may explain the last visit. It is proved that this defendant was in the habit of retiring to bed, and leaving it afterwards, without the knowledge of his family. Perhaps he did so on this occasion. We see no reason to doubt the fact, and it does not shake our belief that the murder was committed early in the night.

What are the probabilities as to the time of the murder? Mr. White was an aged man; he usually retired to bed at about half past 9; he slept soundest in the early part of the night, usually awoke in the middle and latter part, and his habits were perfectly well known. When would persons, with a knowledge of these facts, be most likely to approach him? Most certainly in the first hour of his sleep. This would be the safest time. If seen then, going to or from the house, the appearance would be least suspicious. The earlier hour would then have been most probably selected.

Gentlemen, I shall dwell no longer on the evidence which tends to prove that there was a conspiracy, and that the prisoner was a conspirator. All the circumstances concur to make out this point. Not only Palmer swears to it, in effect, and Leighton, but Allen mainly supports Palmer; and Osborn's books lend confirmation, so far as possible from such a source. Palmer is contradicted in nothing, either by any other witness, or any proved circumstance or occurrence. Whatever could be expected to support him, does support him. All the evidence clearly manifests, I think, that there was a conspiracy; that it originated with J. Knapp; that defendant became a party to it, and was one of its con-

ductors from first to last. One of the most powerful circumstances is Palmer's letter from Belfast. The amount of this was a direct charge on the Knapps, of the authorship of this murder. How did they treat this charge, like honest men, or like guilty men? We have seen how it was treated. J. Knapp fabricated letters, charging another person, and caused them to be put into the post office.

I shall now proceed on the supposition that it is proved that there was a conspiracy to murder Mr. White, and that the prisoner was party to it.

The second, and the material inquiry, is, was the prisoner present at the murder, aiding and abetting therein?

This leads to the legal question in the case, what does the law mean, when it says, to charge him as a principal, "he must be present aiding and abetting in the murder."

In the language of the late Chief Justice, "it is not required that the abettor shall be actually upon the spot when the murder is committed, or even in sight of the more immediate perpetrator of the victim, to make him a principal. If he be at a distance, co-operating in the act, by watching to prevent relief, or to give an alarm, or to assist his confederate in escape, having knowledge of the purpose and object of the assassin, this in the eye of the law is being present, aiding and abetting, so as to make him a principal in the murder."

"If he be at a distance, co-operating"—this is not a distance to be measured by feet or rods—if the intent to lend aid combine with a knowledge that the murder is to be committed, and the person so intending be so situate that he can by any possibility lend this aid in any manner, then he is present in legal contemplation. He need not lend any actual aid; to be ready to assist, is assisting.

There are two sorts of murder; the distinction between them it is of essential importance to bear in mind. 1. Murder in an affray, or upon sudden and unexpected provocation. 2. Murder secretly, with a deliberate, predetermined intention to commit murder. Under the first class the question usually

is, whether the offense be murder or manslaughter in the person who commits the deed. Under the second class it is often a question whether others than he who actually did the deed, were present aiding and assisting thereto. Offenses of this kind ordinarily happen when there is nobody present except those who go on the same design. If a riot should happen in the court house, and one should kill another, this may be murder, or it may not, according to the intention with which it was done; which is always matter of fact to be collected from the circumstances at the time. But in secret murders, premeditated and determined on, there can be no doubt of the murderous intention; there can be no doubt, if a person be present, knowing a murder is to be done, of his concurring in the act; his being there is proof of his intent to aid and abet—else why is he there?

It has been contended that proof must be given that the person accused did actually afford aid, did lend a hand in the murder itself; and without this proof, although he may be near by, he may be presumed to be there for an innocent purpose. He may have crept silently there to hear the news, or from mere curiosity to see what was going on. Preposterous—absurd! Such an idea shocks all common sense. A man is found to be a conspirator to do a murder; he has planned it; he has assisted in arranging the time, the place, and the means; he is found in the place and at the time, and yet it is suggested that he might have been there, not for co-operation and concurrence, but from curiosity! Such an argument deserves no answer. It would be difficult to give it one, in decorous terms. Is it not to be taken for granted that a man seeks to accomplish his own purposes? When he has planned a murder, and is present at its execution, is he there to forward, or to thwart, his own design? Is he there to assist, or there to prevent? But, “curiosity!” He may be there from mere “curiosity!” Curiosity, to witness the success of the execution of his own plan of murder! The very walls of a court house ought not to stand—the plough share should run through the ground it stands on, where such an argument could find toleration.

It is not necessary that the abettor should actually lend a hand—that he should take a part in the act itself. If he be present, ready to assist, that is assisting. Some of the doctrines advanced would acquit the defendant, though he had gone to the bedchamber of the deceased, though he had been standing by when the assassin gave the blow. This is the argument we have heard today. (The COURT here said they did not so understand the argument of the counsel for defendant. *Mr. Dexter* said, “the intent and power alone must co-operate.” *Mr. Webster* continued). No doubt, the law is, that being ready to assist is assisting, if he has the power to assist, in case of need. And it is so stated by Foster, who is a high authority. “If A. happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory.” “But if a fact amounting to murder should be committed in prosecution of some unlawful purpose, though it were but a bare trespass, to which A. in the case last stated had consented, and he had gone in order to give assistance, if need were, for carrying it into execution, this would have amounted to murder in him, and in every person present and joining with him.” “If the fact was committed in prosecution of the original purpose which was unlawful, the whole party will be involved in the guilt of him who gave the blow. For in combinations of this kind, the mortal stroke, though given by one of the party, is considered, in the eye of the law, and of sound reason, too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike.” The author, in speaking of being present, means actual presence—not actual in opposition to constructive, for the law knows no such distinction. There is but one presence, and this is the situation from which aid, or supposed aid, may be rendered. The law does not say where he is to go, or how near he is to go, but somewhere where he may give assistance, or where the per-

petrator may suppose that he may be assisted by him. Suppose that he is acquainted with the design of the murderer, and has a knowledge of the time when it is to be carried into effect, and goes out with a view to render assistance, if need be; why, then, even though the murderer does not know of this, the person so going out will be an abettor in the murder. It is contended that the prisoner at the bar could not be a principal, he being in Brown street, because he could not there render assistance. And you are called upon to determine this case, according as you may be of opinion, whether Brown street was, or was not, a suitable, convenient, well chosen place, to aid in this murder. This is not the true question. The inquiry is not whether you would have selected this place in preference to all others, or whether you would have selected it at all. If they chose it, why should we doubt about it? How do we know the use they intended to make of it, or the kind of aid that he was to afford by being there? The question for you to consider is, did the defendant go into Brown street in aid of this murder? Did he go there by agreement, by appointment with the perpetrator? If so, everything else follows. The main thing, indeed the only thing is, to inquire whether he was in Brown street by appointment with Richard Crowninshield. It might be to keep general watch, to observe the lights, and advise as to time of access, to meet the prisoner on his return, to advise him as to his escape, to examine his clothes to see if there were any marks of blood, to furnish exchange of clothes or new disguise, to tell him through what streets he could safely retreat, or whether he could deposit the club in the place designed; or it might be without any distinct object, but merely to afford that encouragement which would be afforded by Richard Crowninshield's consciousness that he was near. It is of no consequence, whether in your opinion the place was well chosen or not, to afford aid; if it was so chosen, if it was by appointment that he was there, that is enough. Suppose Richard Crowninshield, when applied to commit the murder, had said, "I won't do it unless there can be some one near by, to favor my escape;

I won't go unless you will stay in Brown street." Upon the gentleman's argument, he would not be an aider and abettor in the murder, because the place was not well chosen; though it is apparent that the being in the place chosen was a condition without which the murder would have never happened.

You are to consider the defendant as one in the league, in the combination to commit the murder. If he was there by appointment with the perpetrator, he is an abettor. The concurrence of the perpetrator in his being there, is proved by the previous evidence of the conspiracy. If Richard Crowninshield, for any purpose whatsoever, made it a condition of the agreement that Frank Knapp should stand as backer, then Frank Knapp was an aider and abettor, no matter what the aid was, of what sort it was, or degree, be it ever so little. Even if it were to judge of the hour, when it was best to go, or to see when the lights were extinguished, or to give an alarm if anyone approached. Who better calculated to judge of these things than the murderer himself? And if he so determined them, that is sufficient.

Now as to the facts. Frank Knapp knew that the murder was that night to be committed. He was one of the conspirators, he knew the object, he knew the time. He had that day been to Wenham to see Joseph, and probably to Danvers to see Richard Crowninshield, for he kept his motions secret. He had that day hired a horse and chaise of Osborn, and attempted to conceal the purpose for which it was used. He had intentionally left the place and the price blank on Osborn's books. He went to Wenham by way of Danvers. He had been told the week before to hasten Dick. He had seen the Crowninshields several times within a few days. He had a saddle horse the Saturday night before. He had seen Mrs. Beckford at Wenham, and knew she would not return that night. She had not been away before for six weeks, and probably would not soon be again. He had just come from there. Every day, for the week previous, he had visited one or other of these conspirators, save Sunday, and then probably he saw them in town. When he saw

Joseph on the 6th, Joseph had prepared the house and would naturally tell him of it. There were constant communications between them, daily and nightly visitation; too much knowledge of these parties and this transaction to leave a particle of doubt on the mind of anyone that Frank Knapp knew that the murder was to be done this night. The hour was come and he knew it. If so, and he was in Brown street, without explaining why he was there, can the jury for a moment doubt whether he was there to countenance, aid or support, or for curiosity alone, or to learn how the wages of sin and death were earned by the perpetrator?

The perpetrator would derive courage, and strength, and confidence, from the knowledge of the fact that one of his associates was near by. If he was in Brown street, he could have been there for no other purpose. If there for this purpose, then he was, in the language of the law, present, aiding and abetting in the murder.

His interest lay in being somewhere else. If he had nothing to do with the murder, no part to act, why not stay at home? Why should he jeopard his own life, if it was not agreed that he should be there? He would not voluntarily go where the very place would probably cause him to swing if detected. He would not voluntarily assume the place of danger. His taking this place proves that he went to give aid. His staying away would have made an alibi. If he had nothing to do with the murder, he would be at home, where he could prove his alibi. He knew he was in danger, because he was guilty of the conspiracy, and, if he had nothing to do, would not expose himself to suspicion or detection.

Did the prisoner at the bar countenance this murder? Did he concur, or did he non-concur, in what the perpetrator was about to do? Would he have tried to shield him? Would he have furnished his cloak for protection? Would he have pointed out a safe way of retreat? As you would answer these questions, so you should answer the general question—whether he was there consenting to the murder, or whether he was there a spectator only.

One word more on this presence, called constructive pres-

ence. What aid is to be rendered? Where is the line to be drawn between acting and omitting to act? Suppose he had been in the house, suppose he had followed the perpetrator to the chamber, what could he have done? This was to be a murder by stealth—it was to be a secret assassination. It was not their purpose to have an open combat—they were to approach their victim unawares, and silently give the fatal blow. But if he had been in the chamber, no one can doubt that he would have been an abettor, because of his presence and ability to render services if needed. What service could he have rendered, if there? Could he have helped him fly? Could he have aided the silence of his movements? Could he have facilitated his retreat, on the first alarm? Surely, this was a case where there was more of safety in going alone than with another, where company would only embarrass. Richard Crowninshield would prefer to go alone. He knew his errand too well. His nerves needed no collateral support. He was not the man to take with him a trembling companion. He would prefer to leave his aid at a distance. He would not wish to be embarrassed by his presence. He would prefer to have him out of the house. He would prefer that he should be in Brown street. But, whether in the chamber, in the house, in the garden, or in the street, whatsoever is aiding in immediate presence, is aiding in constructive presence; anything that is aid in one case is aid in the other.

If then the aid be anywhere that emboldens the perpetrator, that affords him hope or confidence in his enterprise, it is the same as though he stood at his elbow with his sword drawn. His being there, ready to act, with the power to act, that is what makes him an abettor. (Here *Mr. Webster* referred to Kelly's case, and Hyde's case, etc., cited by counsel for the defendant, and showed that they did not militate with the doctrine for which he contended.) The difference between the cases referred to by the prisoner's counsel, and this is that in those cases there was open violence; this was a case of secret assassination. The aid must meet the

occasion. Here no acting was necessary, but watching, concealment of escape, management.

What are the facts in relation to this presence. Frank Knapp is proved a conspirator—proved to have known that the deed was now to be done. Is it not probable that he was in Brown street to concur in the murder? There were four conspirators. It was natural that someone of them would go with the perpetrator. Richard Crowninshield was to be the perpetrator—he was to give the blow. There is no evidence of any casting of the parts for the others. The defendant would probably be the man to take the second part. He was fond of exploits, he was accustomed to the use of sword canes and dirks. If any aid was required, he was the man to give it. At least there is no evidence to the contrary of this.

Aid could not have been received from Joseph Knapp or from George Crowninshield. Joseph Knapp was at Wenham, and took good care to prove that he was there. George Crowninshield has proved satisfactorily where he was—that he was in other company, such as it was, until 11 o'clock. This narrows the inquiry. This demands of the prisoner to show that, if he was not in this place, where he was. It calls on him loudly to show this, and to show it truly. If he could show it, he would do it. If he does not tell, and that truly, it is against him. The defense of an alibi is a double-edged sword. He knew that he was in a situation that he might be called upon to account for himself. If he had had no particular appointment or business to attend to, he would have taken care to have been able so to have accounted. He would have been out of town, or in some good company. Has he accounted for himself on that night to your satisfaction?

The prisoner has attempted to prove an alibi in two ways. In the first place, by four young men with whom he says he was in company on the evening of the murder, from 7 o'clock till near 10 o'clock. This depends upon the certainty of the night. In the second place, by his family, from 10 o'clock afterwards. This depends upon the certainty of the time of the night. These two classes of proof have no con-

nection with each other. One may be true and the other false, or they may both be true or both be false. I shall examine the testimony with some attention, because on a former trial it made more impression on the minds of the Court than on my own mind. I think, when carefully sifted and compared, it will be found to have in it more plausibility than reality.

Mr. Page testifies that on the evening of the 6th of April, he was in company with Burchmore, Balch and Forrester, and that he met the defendant about 7 o'clock near the Salem Hotel; that he afterwards met him at Remond's, about 9 o'clock, and that he was in company with him a considerable part of the evening. This young gentleman is a member of College, and says that he came in town the Saturday evening previous, that he is now able to say that it was the night of the murder, when he walked with Frank Knapp, from the recollection of the fact that he called himself to an account on the morning after the murder, as was natural for men to do when an extraordinary occurrence happens. Gentlemen, this kind of evidence is not satisfactory—general impressions as to time are not to be relied on. If I were called upon to state the particular day on which any witness testified in this cause, I could not do it. Every man will notice the same thing in his own mind. There is no one of these young men that could give any account of himself for any other day in the month of April. They are made to remember the fact, and then they think they remember the time. He has no means of knowing it was Tuesday more than any other time. He did not know it at first—he could not know it afterwards. He says he called himself to an account. This has no more to do with the murder than with the man in the moon. Such testimony is not worthy to be relied on, in any forty shilling cause. What occasion had he to call himself to an account? Did he suppose that he should be suspected? Had he any intimation of this conspiracy?

Suppose, gentlemen, you were either of you asked, where you were, or what you were doing, on the 15th day of June. You could not answer this question without calling to mind

some events to make it certain. Just as well may you remember on what you dined on each day of the year past. Time is identical. Its subdivisions are all alike. No man knows one day from another, or one hour from another, but by some fact connected with it. Days and hours are not visible to the senses, nor to be apprehended and distinguished by the understanding. The flow of time is known only by something which marks it; and he who speaks of the date of occurrences with nothing to guide his recollection, speaks at random and is not to be relied on. This young gentleman remembers the facts and occurrences. He knows nothing why they should not have happened on the evening of the 6th, but he knows no more. All the rest is evidently conjecture or impression.

Mr. White informs you that he told him he could not tell what night it was. The first thoughts are all that are valuable in such case. They miss the mark by taking second aim.

Mr. Balch believes, but is not sure, that he was with Frank Knapp on the evening of the murder. He has given different accounts of the time. He has no means of making it certain. All he knows is, that it was some evening before Fast. But whether Monday, Tuesday or Saturday he cannot tell.

Mr. Burchmore says, to the best of his belief, it was the evening of the murder. Afterwards he attempts to speak positively, from recollecting that he mentioned the circumstance to William Peirce, as he went to the Mineral Spring on Fast day. Last Monday morning he told Col. Putnam he could not fix the time. This witness stands in a much worse plight than either of the others. It is difficult to reconcile all he has said, with any belief in the accuracy of his recollections.

Mr. Forrester does not speak with any certainty as to the night, and it is very certain that he told Mr. Loring and others that he did not know what night it was.

Now, what does the testimony of these four young men amount to? The only circumstance by which they approximate to an identifying night is that three of them say it

was cloudy; they think their walk was either on Monday or Tuesday evening; and it is admitted that Monday evening was clear, whence they draw the inference that it must have been Tuesday.

But, fortunately, there is one fact disclosed in their testimony that settles the question. Balch says that on the evening whenever it was that he saw the prisoner, the prisoner told him he was going out of town on horse back, for a distance of about twenty minutes ride, and that he was going to get a horse at Osborn's. This was about 7 o'clock. At about 9, Balch says he saw the prisoner again, and was then told by him that he had had his ride and had returned. Now, it appears by Osborn's books, that the prisoner had a saddle horse from his stable, not on Tuesday evening, the night of the murder, but on the Saturday evening previous. This fixes the time about which these young men testify, and is a complete answer and refutation of the attempted alibi, on Tuesday evening.

I come now to speak of the testimony adduced by the defendant to explain where he was after 10 o'clock on the night of the murder. This comes chiefly from members of the family, from his father and brothers.

It is agreed that the affidavit of the prisoner should be received as evidence of what his brother, Samuel H. Knapp, would testify if present. S. H. Knapp says that about ten minutes past 10 o'clock his brother, F. Knapp, on his way to bed, opened his chamber door, made some remarks, closed the door and went to his chamber, and that he did not hear him leave it afterwards. How is this witness able to fix the time at ten minutes past 10? There is no circumstance mentioned by which he fixes it. He had been in bed, probably asleep, and was aroused from his sleep by the opening of the door. Was he in a situation to speak of time with precision? Could he know, under such circumstances, whether it was ten minutes past 10, or ten minutes before 11, when his brother spoke to him? What would be the natural result in such a case? But we are not left to conjecture this result.

We have positive testimony on this point. Mr. Webb tells you that Samuel told him on the 8th of June, "that he did not know what time his brother Frank came home, and that he was not at home when he went to bed." You will consider this testimony of Mr. Webb as indorsed upon this affidavit, and with this indorsement upon it, you will give it its due weight. This statement was made to him after Frank was arrested.

I come to the testimony of the father. I find myself incapable of speaking of him or his testimony with severity. Unfortunate old man! Another Lear, in the conduct of his children; another Lear, I fear, in the effect of his distress upon his mind and understanding. He is brought here to testify, under circumstances that disarm severity and call loudly for sympathy. Though it is impossible not to see that his story cannot be credited, yet I am not able to speak of him otherwise than in sorrow and grief. Unhappy father! He strives to remember, perhaps persuades himself that he does remember, that on the evening of the murder he was himself at home at 10 o'clock. He thinks, or seems to think, that his son came in at about five minutes past 10. He fancies that he remembers his conversation; he thinks he spoke of bolting the door; he thinks he asked the time of night; he seems to remember his then going to bed. Alas! These are but the swimming fancies of an agitated and distressed mind. Alas! They are but the dreams of hope, its uncertain lights, flickering on the thick darkness of parental distress. Alas! The miserable father knows nothing, in reality, of all these things.

Mr. Shepard says that the first conversation he had with Mr. Knapp was soon after the murder, and before the arrest of his sons. Mr. Knapp says it was after the arrest of his sons. His own fears led him to say to Mr. Shepard that his "son Frank was at home that night, and, so Phippen told him, or as Phippen told him." Mr. Shepard says that he was struck with the remark at the time; that it made an unfavorable impression on his mind. He does not tell you what

that impression was; but when you connect it with the previous inquiry he had made, whether Frank had continued to associate with the Crowninshields, and recollect that the Crowninshields were then known to be suspected of this crime, can you doubt what this impression was? Can you doubt as to the fears he then had?

This poor old man tells you that he was greatly perplexed at the time, that he found himself in embarrassed circumstances, that on this very night he was engaged in making an assignment of his property to his friend, Mr. Sheppard. If ever charity should furnish a mantle for error, it should be here. Imagination cannot picture a more deplorable, distressed condition.

The same general remarks may be applied to his conversation with Mr. Treadwell, as have been made upon that with Mr. Shepard. He told him that he believed Frank was at home about the usual time. In his conversations with either of these persons, he did not pretend to know, of his own knowledge, the time that he came home. He now tells you, positively, that he recollects the time, and that he so told Mr. Shepard. He is directly contradicted by both these witnesses, as respectable men as Salem affords.

This idea of an alibi is of recent origin. Would Samuel Knapp have gone to sea, if it were then thought of? His testimony, if true, was too important to be lost. If there be any truth in this part of the alibi, it is so near in point of time that it cannot be relied on. The mere variation of half an hour would avoid it. The mere variation of different time-pieces would explain it.

Has the defendant proved where he was on that night? If you doubt about it, there is an end of it. The burden is upon him to satisfy you beyond all reasonable doubt. Osborn's books, in connection with what the young men state, are conclusive, I think, on this point. He has not, then, accounted for himself—he has attempted it and has failed. I pray you to remember, gentlemen, that this is a case in which the prisoner would, more than any other, be rationally able to

account for himself, on the night of the murder, if he could do so. He was in the conspiracy, he knew the murder was then to be committed, and if he himself was to have no hand in its actual execution, he would, of course, as matter of safety and precaution, be somewhere else, and be able to prove afterwards that he had been somewhere else. Having this motive to prove himself elsewhere, and the power to do it, if he were elsewhere, his failing in such proof must necessarily leave a very strong inference against him.

But, gentlemen, let us now consider what is the evidence produced on the part of the Government to prove that John Francis Knapp, the prisoner at the bar, was in Brown street on the night of the murder. This is a point of vital importance in this cause. Unless this be made out, beyond reasonable doubt, the law of presence does not apply to the case. The Government undertakes to prove that he was present, aiding in the murder, by proving that he was in Brown street for this purpose. Now, what are the undoubted facts? They are, that two persons were seen in that street, at several times during that evening, under suspicious circumstances; under such circumstances as induced those who saw them to watch their movements. Of this there can be no doubt. Mirick saw a man standing at the post opposite his store, from 15 minutes before 9, until 20 minutes after, dressed in a full frock coat, glazed cap, etc., in size and general appearance answering to the prisoner at the bar. This person was waiting there, and whenever anyone approached him he moved to and from the corner, as though he would avoid being suspected or recognized. Afterwards, two persons were seen by Webster, walking in Howard street, with a slow, deliberate movement that attracted his attention. This was about half-past 9. One of these he took to be the prisoner at the bar, the other he did not know.

About half-past 10 a person is seen sitting on the Rope Walk steps, wrapped in a cloak. He drops his head when passed, to avoid being known. Shortly after, two persons are seen to meet in this street, without ceremony or salutation,

and in a hurried manner to converse for a short time, then to separate and run off with great speed. Now, on this same night, a gentleman is slain, murdered in his bed, his house being entered by stealth from without, and his house situated within 300 feet of this street. The windows of his chamber were in plain sight from this street. A weapon of death is afterwards found in a place where these persons were seen to pass, in a retired place around which they had been seen lingering. It is now known that this murder was committed by a conspiracy of four persons, conspiring together for this purpose. No account is given who these suspected persons thus seen in Brown street and its neighborhood were. Now, I ask, gentlemen, whether you or any man can doubt that this murder was committed by the persons who were thus in and about Brown street? Can any person doubt that they were there for purposes connected with this murder? If not for this purpose, what were they there for? When there is a cause so near at hand, why wander into conjecture for an explanation? Common sense requires you to take the nearest adequate cause for a known effect. Who were these suspicious persons in Brown street? There was something extraordinary about them; something noticeable, and noticed at the time; something in their appearance that aroused suspicion. And a man is found the next morning murdered in the near vicinity.

Now, so long as no other account shall be given of those suspicious persons, so long the inference must remain irresistible that they were the murderers. Let it be remembered that it is already shown that this murder was the result of a conspiracy and of concert; let it be remembered that the house, having been opened from within, was entered by stealth from without. Let it be remembered that Brown street, where these persons were repeatedly seen, under such suspicious circumstances, was a place from which every occupied room in Mr. White's house was clearly seen; let it be remembered that the place, though thus very near to Mr. White's house, was a retired and lonely place; and let it

be remembered that the instrument of death was afterwards found concealed very near the same spot. Must not every man come to the conclusion that these persons, thus seen in Brown street, were the murderers. Every man's own judgment, I think, must satisfy him that this must be so. It is a plain deduction of common sense. It is a point on which each one of you may reason like a Hale or a Mansfield. The two occurrences explain each other. The murder shows why these persons were thus lurking, at that hour, in Brown street, and their lurking in Brown street shows who committed the murder.

If, then, the persons in and about Brown street were the plotters and executors of the murder of Captain White, we know who they were, and you know that there is one of them.

This fearful concatenation of circumstances puts him to an account. He was a conspirator. He had entered into this plan of murder. The murder is committed, and he is known to have been within three minutes' walk of the place. He must account for himself. He has attempted this and failed. Then, with all these general reasons to show he was actually in Brown street, and his failures in his alibi, let us see what is the direct proof of his being there. But first, let me ask, is it not very remarkable that there is no attempt to show where Richard Crowninshield, Jr., was on that night? We hear nothing of him. He was seen in none of his usual haunts about the town. Yet, if he was the actual perpetrator of the murder, which nobody doubts, he was in the town, somewhere. Can you, therefore, entertain a doubt that he was one of the persons seen in Brown street? And as to the prisoner, you will recollect that since the testimony of the young men has failed to show where he was that evening, the last we hear or know of him on the day preceding the murder is that at 4 o'clock P. M. he was at his brother's, in Wenham. He had left home, after dinner, in a manner doubtless designed to avoid observation, and had gone to Wenham, probably by way of Danvers. As we hear nothing of him after 4 o'clock P. M. for the remainder of the day and eve-

ning, as he was one of the conspirators, as Richard Crowninshield, Jr., was another, as Richard Crowninshield, Jr., was in town in the evening, and yet seen in no usual place of resort the inference is very fair that Richard Crowninshield, Jr., and the prisoner were together, acting in execution of their conspiracy. Of the four conspirators, J. J. Knapp, Jr., was at Wenham, and George Crowninshield has been accounted for; so that if the persons seen in Brown street were the murderers, one of them must have been Richard Crowninshield, Jr., and the other must have been the prisoner at the bar. Now, as to the proof of his identity with one of the persons seen in Brown street.

Mr. Myrick, a cautious witness, examined the person he saw closely, in a light night, and says that he thinks the prisoner at the bar is the same person, and that he should not hesitate at all if he were seen in the same dress. His opinion is formed partly from his own observation, and partly from the description of others. But this description turns out to be only in regard to the dress. It is said that he is now more confident than on the former trial. If he has varied in his testimony, make such allowance as you may think proper. I do not perceive any material variance. He thought him the same person when he was first brought to court, and as he saw him get out of the chaise. This is one of the cases in which a witness is permitted to give an opinion. This witness is as honest as yourselves, neither willing nor swift, but he says he believes it was the man; "this is my opinion," and this it is proper for him to give. If partly founded on what he has heard, then his opinion is not to be taken; but if in what he saw, then you can have no better evidence. I lay no stress on similarity of dress. No man will ever be hanged by my voice on such evidence. But then it is proper to notice that no inferences drawn from any dissimilarity of dress can be given in the prisoner's favor; because, in fact, the person seen by Myrick was dressed like the prisoner.

The description of the person seen by Myrick answers to

that of the prisoner at the bar. In regard to the supposed discrepancy of statements, before and now, there would be no end to such minute inquiries. It would not be strange if witnesses should vary. I do not think much of slight shades of variation. If I believe the witness is honest, that is enough. If he has expressed himself more strongly now than then, this does not prove him false.

Peter E. Webster saw the prisoner at the bar, as he then thought and still thinks, walking in Howard street at half-past 9 o'clock. He then thought it was Frank Knapp, and has not altered his opinion since. He knew him well—he had long known him. If he then thought it was he, this goes far to prove it. He observed him the more, as it was unusual to see gentlemen walk there at that hour. It was a retired, lonely street. Now, is there reasonable doubt that Mr. Webster did see him there that night? How can you have more proof than this? He judged by his walk, by his general appearance, by his deportment. We all judge in this manner. If you believe he is right, it goes a great way in this case. But then this person, it is said, had a cloak on, and that he could not, therefore, be the same person that Mirick saw. If we were treating of men that had no occasion to disguise themselves or their conduct, there might be something in this argument. But as it is, there is little in it. It may be presumed that they would change their dress. This would help their disguise. What is easier than to throw off a cloak, and again put it on? Perhaps he was less fearful of being known when alone than when with the perpetrator.

Mr. Southwick swears all that a man can swear. He has the best means of judging that could be had at the time. He tells you that he left his father's house at half-past 10 o'clock, and as he passed to his own house in Brown street, he saw a man sitting on the steps of the Rope Walk, that he passed him three times, and each time he held down his head, so that he did not see his face. That the man had on a cloak, which was not wrapped around him, and a glazed

cap. That he took the man to be Frank Knapp at the time, that when he went into his house, he told his wife he thought it was Frank Knapp; that he knew him well, having known him from a boy. And his wife swears that he did so tell her at the time. What could mislead this witness at the time? He was not then suspecting Frank Knapp of anything. He could not then be influenced by any prejudice. If you believe that the witness saw Frank Knapp in this position, at this time, it proves the case. Whether you believe it or not depends upon the credit of the witness. He swears it—if true, it is solid evidence. Mrs. Southwick supports her husband. Are they true? Are they worthy of belief? If he deserves the epithets applied to him, then he ought not to be believed. In this fact they cannot be mistaken; they are right, or they are perjured. As to his not speaking to Frank Knapp, that depends upon their intimacy. But a very good reason is, Frank chose to disguise himself. This makes nothing against his credit. But it is said that he should not be believed. And why? Because, it is said, he himself now tells you that when he testified before the Grand Jury at Ipswich he did not then say that he thought the person he saw in Brown street was Frank Knapp, but that “the person was about the size of Selman.” The means of attacking him, therefore, come from himself. If he is a false man, why should he tell truths against himself? They rely on his veracity to prove that he is a liar. Before you can come to this conclusion, you will consider whether all the circumstances are now known that should have a bearing on this point. Suppose that when he was before the Grand Jury he was asked by the Attorney this question, “was the person you saw in Brown street about the size of Selman?” and he answered, yes. This was all true. Suppose also that he expected to be inquired of further, and no further questions were put to him? Would it not be extremely hard to impute to him perjury for this? It is not uncommon for witnesses to think that they have done all their duty when they have answered the questions put to them? But suppose that we

admit that he did not then tell all he knew, this does not affect the fact at all, because he did tell, at the time, in the hearing of others, that the person he saw was Frank Knapp. There is not the slightest suggestion against the veracity or accuracy of Mrs. Southwick. Now, she swears positively that her husband came into the house and told her that he had seen a person on the Rope Walk steps, and believed it was Frank Knapp.

It is said that Mr. Southwick is contradicted, also, by Mr. Shillaber. I do not understand Mr. Shillaber's testimony. I think what they both testify is reconcilable and consistent. My learned brother said on a similar occasion that there is more probability in such cases that the persons hearing should misunderstand, than that the person speaking should contradict himself. I think the same remarks applicable here.

You have all witnessed the uncertainty of testimony, when witnesses are called to testify what other witnesses said. Several respectable counsellors have been called on, on this occasion, to give testimony of that sort. They have, every one of them, given different versions. They all took minutes at the time, and without doubt intend to state the truth. But still they differ. Mr. Shillaber's version is different from everything that Southwick has stated elsewhere. But little reliance is to be placed on slight variations in testimony, unless they are manifestly intentional. I think that Mr. Shillaber must be satisfied that he did not rightly understand Mr. Southwick. I confess I misunderstood Mr. Shillaber on the former trial, if I now rightly understand him. I, therefore, did not then recall Mr. Southwick to the stand. Mr. Southwick, as I read it, understood Mr. Shillaber as asking him about a person coming out of Newbury street, and whether, for aught he knew, it might not be Richard Crowninshield, Jr. He answered that he could not tell. He did not understand Mr. Shillaber as questioning him as to the person whom he saw sitting on the steps of the Rope walk. Southwick, on this trial, having heard Mr. Shillaber,

has been recalled to the stand, and states that Mr. Shillaber entirely misunderstood him. This is certainly most probable; because the controlling fact in the case is not controverted—that is, that Southwick did tell his wife, at the very moment he entered his house, that he had seen a person on the Rope Walk steps, whom he believed to be Frank Knapp. Nothing can prove with more certainty than this that Southwick, at the time, thought the person whom he thus saw to be the prisoner at the bar.

Mr. Bray is an acknowledged accurate and intelligent witness. He was highly complimented by my brother on the former trial, although he now charges him with varying his testimony. What could be his motive? You will be slow in imputing to him any design of this kind. I deny altogether, that there is any contradiction. There may be differences, but no contradiction. These arise from the difference in the questions put; the difference between believing and knowing. On the first trial, he said he did not know the person, and now says the same. Then we did not do all we had a right to do. We did not ask him who he thought it was. Now, when so asked, he says he believes it was the prisoner at the bar. If he had then been asked this question, he would have given the same answer. That he has expressed himself stronger I admit; but he has not contradicted himself. He is more confident now, and that is all. A man may not assert a thing, and still not have any doubt upon it. Cannot every man see this distinction to be consistent? I leave him in that attitude; that only is the difference. On questions of identity, opinion is evidence. We may ask the witness, either if he knew who the person seen was, or who he thinks he was. And he may well answer, as Captain Bray has answered, that he does not know who it was, but that he thinks it was the prisoner.

We have offered to produce witnesses to prove that as soon as Bray saw the prisoner, he pronounced him the same person. We are not at liberty to call them to corroborate our own witness. How then could this fact of prisoner's being

in Brown street be better proved? If ten witnesses had testified to it, it would be no better. Two men, who knew him well, took it to be Frank Knapp, and one of them so said when there was nothing to mislead them. Two others that examined him closely now swear to their opinion that he is the man.

Miss Jaqueth saw three persons pass by the Rope walk, several evenings before the murder. She saw one of them pointing towards Mr. White's house. She noticed that another had something which appeared to be like an instrument of music; that he put it behind him and attempted to conceal it. Who were these persons? This was but a few steps from the place where this apparent instrument of music (of music such as Richard Crowninshield, Jr., spoke of to Palmer) was afterwards found. These facts prove this a point of rendezvous for these parties. They show Brown street to have been the place for consultation and observation, and to this purpose it was well suited.

Mr. Burn's testimony is also important. What was the defendant's object, in his private conversation with Burns? He knew that Burns was out that night; that he lived near Brown street, and that he had probably seen him; and he wished him to say nothing. He said to Burns, "if you saw any of your friends out that night, say nothing about it; my brother Jo and I are your friends." This is plain proof that he wished to say to him, if you saw me in Brown street that night, say nothing about it.

But it is said that Burns ought not to be believed because he mistook the color of the dagger, and because he has varied in his description of it. These are slight circumstances, if his general character be good. To my mind they are of no importance. It is for you to make what deduction you may think proper, on this account from the weight of his evidence. His conversation with Burns, if Burns is believed, shows two things; first, that he desired Burns not to mention it, if he had seen him on the night of the murder;

second, that he wished to fix the charge of murder on Mr. Stephen White. Both of these prove his own guilt.

I think you will be of opinion, gentlemen, that Brown street was a probable place for the conspirators to assemble, and for an aid to be stationed. If we knew their whole plan, and if we were skilled to judge in such a case, then we could perhaps determine on this point better. But it is a retired place, and still commands a full view of the house; a lonely place, but still a place of observation. Not so lonely that a person would excite suspicion to be seen walking there in an ordinary manner; not so public as to be noticed by many. It is near enough to the scene of action in point of law. It was their point of centrality. The club was found near the spot, in a place provided for it, in a place that had been previously hunted out, in a concerted place of concealment. Here was their point of rendezvous. Here might the lights be seen. Here might an aid be secreted. Here was he within call. Here might he be aroused by the sound of the whistle. Here might he carry the weapon. Here might he receive the murderer, after the murder.

Then, gentlemen, the general question occurs, is it satisfactorily proved, by all these facts and circumstances, that the defendant was in and about Brown street, on the night of the murder? Considering, that the murder was effected by a conspiracy; considering, that he was one of the four conspirators; considering, that two of the conspirators have accounted for themselves, on the night of the murder, and were not in Brown street; considering that the prisoner does not account for himself, nor show where he was; considering that Richard Crowninshield, the other conspirator, and the perpetrator, is not accounted for, nor shown to be elsewhere; considering, that it is now past all doubt that two persons were seen in and about Brown street, at different times, lurking, avoiding observation, and exciting so much suspicion that the neighbors actually watched them; considering, that if these persons, thus lurking in Brown street, at that hour, were not the murderers, it remains, to this day, wholly un-

known, who they were, or what their business was; considering the testimony of Miss Jaqueth, and that the club was afterwards found near this place; considering, finally, that Webster and Southwick saw these persons, and then took one of them for the defendant, and that Southwick then told his wife so, and that Bray and Mirick examined them closely, and now swear to their belief that the prisoner was one of them; it is for you to say, putting these considerations together, whether you believe the prisoner was actually in Brown street at the time of the murder.

By the counsel for the prisoner, much stress has been laid upon the question whether Brown street was a place in which aid could be given—a place in which actual assistance could be rendered in this transaction? This must be mainly decided by their own opinion who selected the place; by what they thought at the time, according to their plan of operation.

If it was agreed that the prisoner should be there to assist, it is enough. If they thought the place proper for their purpose, according to their plan, it is sufficient.

Suppose we could prove expressly that they agreed that Frank should be there, and he was there, and you should think it not a well chosen place for aiding and abetting, must he be acquitted? No! It is not what I think, or you think, of the appropriateness of the place—it is what they thought at the time.

If the prisoner was in Brown street, by appointment and agreement with the perpetrator, for the purpose of giving assistance, if assistance should be needed, it may safely be presumed that the place was suited to such assistance as it was supposed by the parties might chance to become requisite.

If in Brown street, was he there by appointment? Was he there to aid, if aid were necessary? Was he there for, or against, the murderer? To concur, or to oppose? To favor or to thwart? Did the perpetrator know he was there—there waiting? If so, then it follows, he was there by appointment. He was at the post half an hour—he was

waiting for somebody. This proves appointment—arrangement—previous agreement. Then it follows, he was there to aid, to encourage, to embolden the perpetrator, and that is enough. If he were in such a situation as to afford aid, or that he was relied upon for aid, then he was aiding and abetting. It is enough that the conspirator desired to have him there. Besides, it may be well said, that he could afford just as much aid there as if he had been in Essex street, as if he had been standing even at the gate or at the window. It was not an act of power against power that was to be done—it was a secret act, to be done by stealth. The aid was to be placed in a position secure from observation. It was important to the security of both, that he should be in a lonely place. Now, it is obvious that there are many purposes for which he might be in Brown street.

1. Richard Crowninshield might have been secreted in the garden, and waiting for a signal.

2. Or he might be in Brown street, to advise him as to the time of making his entry into the house.

3. Or to favor his escape.

4. Or to see if the street was clear when he came out.

5. Or to conceal the weapon or the clothes.

6. To be ready for any other unforeseen contingency.

Richard Crowninshield lived in Danvers—he would retire the most secret way. Brown street is that way. If you find him there, can you doubt why he was there?

If, gentlemen, the prisoner went into Brown street, by appointment with the perpetrator, to render aid or encouragement in any of these ways, he was present, in legal contemplation, aiding and abetting in this murder. It is not necessary that he should have done anything; it is enough that he was ready to act, and in a place to act. If his being in Brown street, by appointment, at the time of the murder, emboldened the purpose, and encouraged the heart of the murderer, by the hope of instant aid, if aid should become necessary, then, without doubt, he was present, aiding and

abetting, and was a principal in the murder.

I now proceed, gentlemen, to the consideration of the testimony of Mr. Colman. Although this evidence bears on every material part of the cause, I have purposely avoided every comment on it till the present moment, when I have done with the other evidence in the case. As to the admission of this evidence, there has been a great struggle, and its importance demanded it. The general rule of law is, that confessions are to be received as evidence. They are entitled to great or to little consideration, according to the circumstances under which they are made. Voluntary, deliberate confessions are the most important and satisfactory evidence. But confessions hastily made, or improperly obtained, are entitled to little or no consideration. It is always to be inquired, whether they were purely voluntary, or were made under any undue influence of hope or fear; for, in general, if any influence were exerted on the mind of the person confessing, such confessions are not to be submitted to a jury.

Who is Mr. Colman? He is an intelligent, accurate, and cautious witness. A gentleman of high and well-known character and of unquestionable veracity. As a clergyman, highly respectable; as a man, of fair name and fame.

Why was Mr. Colman with the prisoner? Joseph J. Knapp was his parishioner. He was the head of a family, and had been married by Mr. Colman. The interests of his family were dear to him. He felt for their afflictions, and was anxious to alleviate their sufferings. He went from the purest and best motives to visit Joseph Knapp. He came to save, not to destroy—to rescue, not to take away life. In this family he thought there might be a chance to save one. It is a misconstruction of Mr. Colman's motives, at once the most strange and the most uncharitable, a perversion of all just views of his conduct and intentions, the most unaccountable, to represent him as acting, on this occasion, in hostility to any one, or as desirous of injuring or endangering any one. He has stated his own motives, and his own conduct,

in a manner to command universal belief and universal respect. For intelligence, for consistency, for accuracy, for caution, for candor, never did witness acquit himself better, or stand fairer. In all that he did, as a man, and all he has said, as a witness, he has shown himself worthy of entire regard.

Now, gentlemen, very important confessions, made by the prisoner, are sworn to by Mr. Colman. They were made in the prisoner's cell, where Mr. Colman had gone, with the prisoner's brother, N. P. Knapp. Whatever conversation took place, was in the presence of N. P. Knapp. Now, on the part of the prisoner, two things are asserted; first, that such inducements were suggested to the prisoner, in this interview, that any confessions by him ought not to be received. Second, that, in point of fact, he made no such confessions, as Mr. Colman testifies to, nor, indeed, any confessions at all. These two propositions are attempted to be supported by the testimony of N. P. Knapp. These two witnesses, Mr. Colman and N. P. Knapp, differ entirely. There is no possibility of reconciling them. No charity can cover both. One or the other has sworn falsely. If N. P. Knapp be believed, Mr. Colman's testimony must be wholly disregarded. It is, then, a question of credit, a question of belief, between the two witnesses. As you decide between these, so you will decide on all this part of the case.

Mr. Colman has given you a plain narrative, a consistent account, and has uniformly stated the same things. He is not contradicted by anything in the case, except Phippen Knapp. He is influenced as far as we can see by no bias, or prejudice, any more than other men, except so far as his character is now at stake. He has feelings on this point, doubtless, and ought to have. If what he has stated be not true, I cannot see any ground for his escape. If he be a true man, he must have heard what he testifies. No treachery of memory brings to memory things that never took place. There is no reconciling his evidence with good intention, if

the facts are not as he states them. He is on trial as to his veracity.

The relation in which the other witness stands deserves your careful consideration. He is a member of the family. He has the lives of two brothers depending, as he may think, on the effect of his evidence; depending on every word he speaks. I hope he has not another responsibility resting upon him. By the advice of a friend, and that friend Mr. Colman, J. Knapp made a full and free confession, and obtained a promise of pardon. He has since, as you know, probably by the advice of other friends, retracted that confession and rejected the offered pardon. Events will show who of these friends and advisers advised him best, and befriended him most. In the meantime, if this brother, the witness, be one of these advisers, and advised the retraction, he has, most emphatically, the lives of his brothers resting upon his evidence, and upon his conduct. Compare the situation of these two witnesses. Do you not see mighty motive enough on the one side, and want of all motive on the other? I would gladly find an apology for that witness, in his agonized feelings, in his distressed situation—in the agitation of that hour, or of this. I would gladly impute it to error, or to want of recollection, to confusion of mind, or disturbance of feeling. I would gladly impute to any pardonable source that which cannot be reconciled to facts and to truth; but even in a case calling for so much sympathy, justice must yet prevail, and we must come to the conclusion, however reluctantly, which that demands from us.

It is said Phippen Knapp was probably correct, because he knew he should be called as a witness. Witness—to what? When he says there was no confession, what could he expect to bear witness of? But I do not put it on the ground that he did not hear—I am compelled to put it on other ground—that he did hear, and does not now truly tell what he heard.

If Mr. Colman were out of the case, there are other reasons why the story of Phippen Knapp should not be believed. It has in it inherent improbabilities. It is unnatural, and

inconsistent with the accompanying circumstances. He tells you that they went "to the cell of Frank, to see if he had any objection of taking a trial, and suffering his brother to accept the offer of pardon"—in other words to obtain Frank's consent to Joseph's making a confession; and in case this consent was not obtained, that the pardon would be offered to Frank, etc. Did they bandy about the chance of life, between these two, in this way? Did Mr. Colman, after having given this pledge to Joseph, after having received a disclosure from Joseph, go to the cell of Frank for such a purpose as this? It is impossible—it cannot be so.

Again. We know that Mr. Colman found the club the next day—that he went directly to the place of deposit and found it at the first attempt, exactly where he says he had been informed it was. Now Phippen Knapp says that Frank had stated nothing respecting the club, that it was not mentioned in that conversation. He says, also, that he was present in the cell of Joseph all the time that Mr. Colman was there, that he believes he heard all that was said in Joseph's cell, and that he did not himself know where the club was, and never had known where it was until he heard it stated in court. Now, it is certain that Mr. Colman says, he did not learn the particular place of deposit of the club from Joseph, that he only learned from him that it was deposited under the steps of the Howard street Meeting House, without defining the particular steps. It is certain, also, that he had more knowledge of the position of the club than this, else how could he have placed his hand on it so readily, and where else could he have obtained this knowledge, except from Frank? (Here *Mr. Dexter* said that Mr. Colman had had other interviews with Joseph, and might have derived the information from him at previous visits. *Mr. Webster* replied that Mr. Colman had testified that he learned nothing in relation to the club until this visit. *Mr. Dexter* denied there being any such testimony. Mr. Colman's evidence was then read from the notes of the judges, and several other persons, and *Mr. Webster* then proceeded.) My point is to

show that Phippen Knapp's story is not true, is not consistent with itself. That taking it for granted, as he says that he heard all that was said to Mr. Colman in both cells, by Joseph and by Frank—and that Joseph did not state particularly where the club was deposited—and that he knew as much about the place of deposit of the club, as Mr. Colman knew—why then Mr. Colman must either have been miraculously informed respecting the club, or Phippen Knapp has not told you the whole truth. There is no reconciling this without supposing Mr. Colman has misrepresented what took place in Joseph's cell, as well as what took place in Frank's cell.

Again. Phippen Knapp is directly contradicted by Mr. Wheatland. Mr. Wheatland tells the same story as coming from Phippen Knapp, as Mr. Colman now tells. Here there are two against one. Phippen Knapp says that Frank made no confessions, and that he said he had none to make. In this he is contradicted by Wheatland. He, Phippen Knapp, told Wheatland, that Mr. Colman did ask Frank some questions, and that Frank answered them. He told him also what these answers were. Wheatland does not recollect the questions or answers—but recollects his reply—which was, "Is not this premature? I think this answer is sufficient to make Frank a principal." Here Phippen Knapp opposes himself to Wheatland, as well as to Mr. Colman. Do you believe Phippen Knapp against these two respectable witnesses—or them against him?

Is not Mr. Colman's testimony credible, natural and proper? To judge of this, you must go back to that scene.

The murder had been committed—the two Knapps were now arrested—four persons were already in jail supposed to be concerned in it—the Crowninshields and Selman and Chase—another person at the Eastward was supposed to be in the plot—it was important to learn the facts—to do this, some one of those suspected must be admitted to turn State's witness—the contest was, who should have this privilege? It was understood that it was about to be offered to Palmer,

then in Maine—there was no good reason why he should have the preference. Mr. Colman felt interested for the family of the Knapps, and particularly for Joseph. He was a young man who had hitherto sustained a fair standing in society—he was a husband. Mr. Colman was particularly intimate with his family. With these views he went to the prison. He believed that he might safely converse with the prisoner, because he thought confessions made to a clergyman were sacred, and that he could not be called upon to disclose them. He went, the first time, in the morning, and was requested to come again; he went again at 3 o'clock; and was requested to call again at 5 o'clock. In the meantime he saw the father and Phippen, and they wished he would not go again, because it would be said the prisoners were making confession. He said he had engaged to go again at 5 o'clock; but would not if Phippen would excuse him to Joseph. Phippen engaged to do this, and to meet him at his office at 5 o'clock. Mr. Colman went to the office at the time, and waited—but as Phippen was not there, he walked down street and saw him coming from the jail. He met him, and while in conversation, near the church, he saw Mrs. Beckford and Mrs. Knapp, going in a chaise toward the jail. He hastened to meet them, as he thought it not proper for them to go in at that time. While conversing with them near the jail, he received two distinct messages from Joseph, that he wished to see him. He thought it proper to go—he then went to Joseph's cell, and while there it was that the disclosures were made. Before Joseph had finished his statement, Phippen came to the door—he was soon after admitted—a short interval ensued, and they went together to the cell of Frank—Mr. Colman went in by invitation of Phippen—he had come directly from the cell of Joseph, where he had for the first time learned the incidents of the tragedy. He was incredulous as to some of the facts which he had learned—they were so different from his previous impressions. He was desirous of knowing whether he could place confidence in what Joseph had told him. He therefore put the questions to Frank, as he has

testified before you, in answer to which Frank Knapp informed him:

1. "That the murder took place between 10 and 11 o'clock."

2. "That Richard Crowninshield was alone in the house."

3. "That he, Frank Knapp, went home afterwards."

4. "That the club was deposited under the steps of the Howard street meeting house—and under the part nearest the burying ground, in a rat hole, etc."

5. "That the dagger or daggers had been worked up at the factory."

It is said that these five answers just fit the case—that they are just what was wanted, and neither more or less. True, they are—but the reason is, because truth always fits—truth is always congruous, and agrees with itself. Every truth in the universe agrees with every other truth in the universe, whereas, falsehoods not only disagree with truths, but usually quarrel among themselves. Surely Mr. Colman is influenced by no bias—no prejudice—he has no feelings to warp him—except now he is contradicted, he may feel an interest to be believed.

If you believe Mr. Colman, then the evidence is fairly in the case. I shall now proceed on the ground that you do believe Mr. Colman.

When told that Joseph had determined to confess, the defendant said, "It is hard, or unfair that Joseph should have the benefit of confessing, since the thing was done for his benefit." What thing was done for his benefit? Does not this carry an implication of the guilt of the defendant? Does it not show that he had a knowledge of the object, and history of the murder?

The defendant said, "I told Joseph when he proposed it, that it was a silly business, and would get us into trouble." He knew, then, what this business was—he knew that Joseph proposed it, and that he agreed to it, else it could not get us into trouble—he understood its bearing, and its consequences. Thus, much was said under circumstances, that make it

clearly evidence against him, before there is any pretence of an inducement held out. And does not this prove him to have had a knowledge of the conspiracy?

He knew the daggers had been destroyed—and he knew who committed the murder. How could he have innocently known these facts? Why, if by Richard's story, this shows him guilty of a knowledge of the murder, and of the conspiracy. More than all, he knew when the deed was done, and he went home afterwards. This shows his participation in that deed—"went home afterwards"—home, from what scene? Home from what fact? Home, from what transaction? Home, from what place? This confirms the supposition that the prisoner was in Brown street for the purposes ascribed to him. These questions were directly put, and directly answered. He does not intimate that he received the information from another. Now, if he knows the time, and went home afterwards, and does not excuse himself—is not this an admission that he had a hand in this murder? Already proved to be a conspirator, in the murder, he now confesses that he knew who did it, at what time it was done, was out of his own house, at the time, and went home afterwards. Is not this conclusive, if not explained? Then comes the club. He told where it was. This is like possession of stolen goods. He is charged with the guilty knowledge of this concealment. He must show, not say, how he came by this knowledge. If a man be found with stolen goods, he must prove how he came by them. The place of deposit of the club was predemitted and selected—and he knew where it was.

Joseph Knapp was an accessory, and accessory only—he knew only what was told him. But the prisoner knew the particular spot in which the club might be found. This shows his knowledge something more than that of an accessory.

This presumption must be rebutted by evidence, or it stands strong against him. He has too much knowledge of this transaction, to have come innocently by it. It must stand against him until he explains it.

This testimony of Mr. Colman is represented as new matter—and therefore an attempt has been made to excite a prejudice against it. It is not so. How little is there in it, after all that did not appear from other sources? It is mainly confirmatory. Compare what you learn from this confession with what you before knew—

As to its being proposed by Joseph—was not that true?

As to Richard's being alone, etc., in the house—was not that true?

As to the daggers—was not that true?

As to the time of the murder—was not that true?

As to his being out that night—was not that true?

As to his returning afterwards—was not that true?

As to the club—was not that true?

So this information confirms what was known before—and fully confirms it.

One word, as to the interview between Mr. Colman and Phippen Knapp on the turnpike. It is said that Mr. Colman's conduct in this matter is inconsistent with his testimony. There does not appear to me to be any inconsistency. He tells you that his object was to save Joseph, and to hurt no one—and least of all the prisoner at the bar. He had probably told Mr. White the substance of what he heard at the prison. He had probably told him that Frank confirmed what Joseph had confessed. He was unwilling to be the instrument of harm to Frank. He therefore, at the request of Phippen Knapp, wrote a note to Mr. White, requesting him to consider Joseph as authority for the information he had received. He tells you that this is the only thing he has to regret—as it may seem to be an evasion—as he doubts whether it was entirely correct. If it was an evasion, if it was a deviation, if it was an error—it was an error of mercy—an error of kindness—an error that proves he had no hostility to the prisoner at the bar. It does not in the least vary his testimony or affect its correctness. Gentlemen, I look on the evidence of Mr. Colman as highly important, not as bringing into the cause new facts, but as confirming, in a very satis-

factory manner, other evidence. It is incredible, that he can be false, and that he is seeking the prisoner's life, through false swearing. If he is true, it is incredible that prisoner can be innocent.

Gentlemen, I have gone through with the evidence in this case, and have endeavored to state it plainly and fairly, before you. I think there are conclusions to be drawn from it which you cannot doubt. I think you cannot doubt that there was a conspiracy formed for the purpose of committing this murder, and who the conspirators were.

That you cannot doubt that the Crowninshields and the Knapps were the parties in the conspiracy.

That you cannot doubt that the prisoner at the bar knew that the murder was to be done on the night of the 6th of April.

That you cannot doubt that the murderers of Captain White were the suspicious persons seen in and about Brown street on that night.

That you cannot doubt, that Richard Crowninshield was the perpetrator of that crime.

That you cannot doubt, that the prisoner at the bar was in Brown street on that night.

If there, then it must be by agreement—to countenance, to aid the perpetrator. And if so, then he is guilty as principal.

Gentlemen, your whole concern should be to do your duty, and leave consequences to take care of themselves. You will receive the law from the Court. Your verdict, it is true, may endanger the prisoner's life; but then, it is to save other lives. If the prisoner's guilt has been shown and proved, beyond all reasonable doubt, you will convict him. If such reasonable doubts of guilt still remain, you will acquit him. You are the judges of the whole case. You owe a duty to the public, as well as to the prisoner at the bar. You cannot presume to be wiser than the law. Your duty is a plain, straightforward one. Doubtless, we would all judge him in mercy. Towards him, as an individual, the law inculcates no hostility—but towards him, if proved to be a murderer, the law,

and the oaths you have taken, and the public justice, demand that you do your duty.

With consciences satisfied with the discharge of duty, no consequences can harm you. There is no evil that we cannot either face or fly from—but the consciousness of duty disregarded.

A sense of duty pursues us ever. It is omnipresent, like the Deity. If we take to ourselves the wings of the morning and dwell in the uttermost parts of the sea, duty performed, or duty violated, is still with us, for our happiness, or our misery. If we say the darkness shall cover us, in the darkness as in the light, our obligations are yet with us. We cannot escape their power, nor fly from their presence. They are with us in this life, will be with us at its close, and in that scene of inconceivable solemnity, which lies yet farther onward—we shall still find ourselves surrounded by the consciousness of duty, to pain us, wherever it has been violated, and to console us so far as God may have given us grace to perform it.

The *Prisoner* was then inquired of by the COURT whether he had anything further to add to the defense made by his counsel, to which he replied, "I have nothing more to say."

THE CHARGE OF THE COURT.

JUDGE PUTNAM. Gentlemen of the Jury: The prisoner at the bar stands accused by the Grand Jury of this county of the crime of murder—as principal in the second degree. His counsel contend that if the evidence proves the prisoner to be guilty of any offense, it is not the offense of a principal, but of an accessory before the fact. It becomes necessary to state to you the distinction between those crimes—not on account of the punishment—for that is the same in both cases—but because the law requires that the offense shall be fully and plainly, substantially and formally described to the party accused—so that he may know how to avail himself of all legal advantages in his defense.

It has been said at the bar, and such is the law, that if a party is charged as an accessory he cannot be put upon his

trial before the conviction of the principal. And it has been urged by the counsel for the prisoner that the common law has been altered by the Statute of 1784, chapter 65—whereby those who before were principals in the second degree are made accessories before the fact—and are entitled to all the privileges of accessories before the fact in the form and time of trial.

By the most ancient common law, as it was generally understood, those persons only were considered as principals in murder who actually killed the man—and those who were present aiding and abetting were considered as accessories. So that if he who gave the mortal blow were not convicted, he who was present and aiding, being only an accessory, could not be put upon his trial. But the law was otherwise settled in the reign of Henry IV, which commenced A. D. 1460. And it was then adjudged that he who was present aiding and abetting him who actually killed, was to be considered as actually killing, as much as if he himself had given the deadly blow.

The law has been so understood from that time to the present, unless it has been altered by our Legislature by the Statute of 1784, chapter 65—as has been contended by the counsel for the prisoner. By the first section of that act it is provided “that if any person shall aid, assist, abet, counsel, hire, command or procure any person to commit the crime of murder (or other crimes therein mentioned) he is and shall be considered as an accessory before the fact to the principal offender or offenders, and being thereof convicted, shall suffer the like punishment as is by law assigned for the crime, for the commission of which he shall be so accessory.” And it is urged for the prisoner that the distinction theretofore admitted to have existed, between persons present, and persons not present, aiding and abetting the commission of the felony, was done away. So that all persons, whether present or absent, who should only aid and abet another, or others to commit murder or other felony, should be considered and taken to be accessories only, and have all the privileges of ac-

cessories—one of which was—not to be compelled to answer before the principal offender should have been convicted.

As this point is of great importance in this case, the Court have examined it with care, and after much deliberation, are of opinion that the Statute of 1784, chapter 65, was not intended to alter the Common Law as it then stood—but referred to persons aiding and abetting who were not present—who were then technically considered as accessories.

The title of the act indicates its objects. It was “An act against accessories to crimes and felonious assaulters.” It did not purport to make any new description of the persons who should be considered as accessories, but to provide for the punishment of such offenders. It is an established rule that a statute is not to be construed so as to alter the Common Law, unless the intent to alter it is clearly expressed. No such intention can be reasonably inferred from the language of these statutes. The words of the Statute of 1784 describe accessories before and after the fact—and if it had been the intention of the legislature to restore the old distinction as to accessories at the fact, it would have described such offenders, by apt words. When technical words are used, they are to be understood in their technical sense and meaning, unless the contrary clearly appears. The object of this statute being to provide for the punishment of accessories, we must conclude that it related only to accessories in the legal sense at the time of the passage of the act—and not to those who were in the eye of the law then regarded as principals—so that, construing the Statute of 1784, chapter 65, by its own language, we do not think it can be understood as relating to persons present aiding and abetting in the commission of a felony.

And we think that the Statute of 1804, chapter 123, section 1, contains a legislative construction to the same effect. It provides that “if any person shall commit the crime of wilful murder, or shall be present aiding and abetting the commission of such crime—or not being present, shall have been accessory thereto before the fact, by counselling, hiring or

otherwise procuring the same to be done, every such offender who in the Supreme Judicial Court shall be duly convicted of either of the felonies aforesaid shall suffer the punishment of death."

It seems to be very clear that this statute regards persons present aiding, etc., as principals, for otherwise persons present, and persons absent, would not have been separately described—those who were absent being considered as accessories. So that if the former statute had been doubtful, the doubt would have been removed by the latter—especially when it is considered that all the statutes upon the same subject are to be construed as one statute.

We return to the consideration of the charge against the prisoner. He is indicted as a principal in the murder of Joseph White. He who actually perpetrates the murder is called a principal in the first degree. He who was present, aiding and abetting, is called a principal in the second degree. Both are principals in the murder. The blows given by one are considered as having been given by the other—just as if both had held and wielded the deadly weapon.

There is no evidence that the prisoner gave the mortal blows with his own hand. But it is contended on the part of the government that he was present aiding and abetting the perpetrator at the time when the crime was committed.

We are therefore to consider what facts are necessary to be proved to constitute him, who is aiding and abetting, to be a principal in the murder—or (in other words) what in the sense of the law is meant by being present—aiding and abetting.

It is laid down in Foster's Crown Law, 349, 350, Discourse 111, Sec. 4, that "when the law requireth the presence of the accomplice at the perpetration of the fact, in order to render him a principal, it doth not require a strict, actual, immediate presence—such a presence as would make him an eye or an ear witness of what passeth. Several persons set out together or in small parties, upon one common design, be it murder or other felony, or for any purpose unlawful in it-

self—and each taketh the part assigned him—some to commit the fact—others to watch at proper distances and stations to prevent a surprise, or favor if need be the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it. For it was made a common cause with them—each man operated at his station at one and the same instant towards the same common end—and the part each man took tended to give countenance, encouragement and protection to the whole gang and to insure the success of their common enterprise.” In order to render a person an accomplice, a principal in felony, he must be aiding and abetting at the fact—or ready to afford assistance if necessary. Being present in judgment of the law is equivalent to being actually present—for, says Hawkins, “The hope of immediate assistance encourages and emboldens the murderer to commit the fact—which otherwise he would not have dared to do—and makes them guilty in the same degree (as principals) as if they had actually stood by, with their swords drawn and ready to second the villainy.”

These principles have been fully recognized by the very learned and distinguished Chief Justice of the Supreme Court of the United States—in the trial of Aaron Burr.^d

The person charged as a principal in the second degree must be present—and he must be aiding and abetting the murder.

But if the abettor at the time of the commission of the crime were assenting to the murder—and in a situation where he might render some aid to the perpetrator—ready to give it if necessary—according to an appointment or agreement with him, for that purpose—he would in the judgment of the law, be present and aiding in the commission of the crime.

It must therefore be proved that the abettor was in a situation in which he might render his assistance in some manner to the commission of the offense.

It must be proved that he was in such a situation, by agreement with the perpetrator of the crime—or with his previous

knowledge, consenting to the crime—and for the purpose of rendering aid and encouragement in the commission of it.

It must also be proved that he was actually aiding and abetting the perpetrator at the time of the murder—but if the abettor were consenting to the murder—and in a situation in which he might render any aid, by arrangement with the perpetrator, for the purpose of aiding and assisting him in the murder—then it would follow as a necessary legal inference, that he was actually aiding and abetting at the commission of the crime.

For the presence of the abettor under such circumstances, must encourage and embolden the perpetrator to do the deed, by giving him hopes of immediate assistance—and this would in law be considered as actually aiding and abetting him—although no further assistance should be given.

For it is clear that if a person is present aiding and consenting to a murder or other felony, that alone is sufficient to charge him as a principal in the crime. And we have seen that the presence by construction or judgment of the law, is in this respect equivalent to actual presence.

We do not, however, assent to the position which has been taken by the counsel for the government, that if it should be proved that the prisoner conspired with others to procure the murder to be committed—that it follows as a legal presumption that the prisoner aided in the actual perpetration of the crime, unless he can show the contrary to the jury.

The fact of the conspiracy being proved against the prisoner, is to be weighed as evidence in the case, having a tendency to prove that the prisoner aided—but is not in itself to be taken as a legal presumption of his having aided, unless disproved by him. It is a question of evidence for the consideration of the jury.

If, however, the jury should be of opinion that the prisoner was one of the conspirators, and in a situation in which he might have given some aid to the perpetrator at the time of the murder, then it would follow as a legal presumption that he was there to carry into effect the concerted crime,

and it would be for the prisoner to rebut that presumption by showing to the jury that he was there for another purpose unconnected with the conspiracy. We are all of opinion that these are the principles of the law applicable to the case upon trial. And it will be for the jury to ascertain the facts from the evidence, and upon the whole matter to pronounce their verdict.

I shall endeavor to call your attention to the most material parts of the evidence in as plain a manner as I can, without remarking upon all the facts which may have been introduced into the case. I refer to those generally, as being in your recollection. The government must prove that Mr. White was murdered and that the prisoner in the sense of the law was present, aiding and abetting, and so a principal in that crime.

In regard to the first point—it will not be necessary for me to state the evidence particularly. I refer you to the testimony of the physicians—and of others who saw and examined the dead and mangled body. There were no witnesses present at the time the murder was committed. It is not contended but that the testimony proves beyond any question, that the accused came to his death by the blows and stabs inflicted by one or more assassins. I shall not attempt to speak of that horrible deed as it has been spoken of by the learned counsel for the government. There is no heart that does not respond to that impressive description.

The murder having been proved, the next question is if the prisoner were, in the sense of the law as it has been explained and declared, present aiding and abetting. The government contends that the evidence proves that Richard Crowninshield, Jr., was the perpetrator of the deed; so that the question is narrowed—and you are to consider if the prisoner were present, aiding and assisting Richard Crowninshield, Jr., to commit the murder?

It is not necessary to remind you to come to the consideration of this question, with minds free from prejudice. We have a right to consider you to be good men and true; that

you will ascertain what facts are proved—and that you will draw all necessary inferences from those facts. This is a case of circumstantial evidence. But when clear, connected and satisfactory, it is as strong evidence as positive testimony. Sometimes it is more satisfactory than the positive evidence of a single witness—for it is not so likely that a number of witnesses who establish the chain of circumstances would be perjured or mistaken, as that a single witness would be.

But the jury will take care to examine all the links which constitute the chain—and if any one of them shall be unsound, the whole chain will be affected and cannot be relied upon here. If such facts and circumstances are satisfactorily proved, as lead the mind to a reasonable conclusion of guilt, the jury will come to that result. The question in such cases is, whether the innocence of the party can reasonably be believed to exist consistently with the facts and circumstances which are proved in the case. The government would satisfy you that a conspiracy was formed for the purpose of murdering Mr. White, by the prisoner, his brother Joseph, and the two Crowninshields; and the acts and confessions of the co-conspirators, as well as of the prisoner, are offered in evidence against him. And the rule of the law is, that, as they who conspire together to commit a crime are partners in iniquity—when the conspiracy is established—and the party upon trial is proved to be one of the conspirators, the confessions, declarations and acts of the co-conspirators, in aid or concealment of the criminal project, are considered as legal evidence against the party on trial, as if he himself had made them.

The first witness who was called to prove the conspiracy was Leighton, who swears to a most remarkable conversation between the prisoner and his brother Joseph. He seems to have heard just enough to prove the fact, and it seems not to be susceptible of much, if any explanation. But you saw, that his appearance and manner of testifying was somewhat extraordinary, and that he has not been consistent in regard to his knowledge upon this matter. You are the judges of the

credibility of the witnesses who are permitted by the rules of the law to testify in the case. It does not appear that this witness had ever been impeached on account of his general bad character for truth. But if the facts and circumstances which he relates, were so unlikely to take place and so improbable as to induce you to doubt of their truth, you will not depend upon them. The contradictory statements he has made upon the matter will also be taken into your consideration. If, however, you believe the conversation to have been as he swears it was, it goes very clearly to fix the conspiracy upon the prisoner, his brother Joseph, and Richard Crowninshield, Jr. (States Leighton's testimony.)

It is for you to consider under what circumstances these words were uttered. Would a conversation of this nature have been delayed so long? They had been together for some hours before, walking about in the fields. This seems to be the beginning of a conversation upon that subject, which must have been uppermost in their minds. Would it have been so long deferred?

It is contended on the part of the government that nothing which was said before or after, can take away the force of the words. They must refer to Capt. White and to Richard Crowninshield, Jr., and to the thousand dollars. Consider the excuse which the witness offers for his contradictory statements. "He was frightened, and could not recollect anything about it." This was most extraordinary conduct. But it is contended for the prisoner that one part of the story cannot be true—that he heard their conversation when they were twenty-five rods off. You must judge whether the witness was mistaken merely in regard to the distance. But he swears that he was within a few feet when they had the conversation which is so material in this case. In that he cannot be mistaken. If he speaks the truth he was near enough to hear distinctly what they said. If they did not speak the words, the witness must be corrupt or perjured. But what motive is there to induce him to give this evidence, if it be not true? If he has been bribed, who bribed him? He has

been in the employment of the brother of the prisoner, and still remains upon the farm.

The next witness is Palmer, who from his own account and the other evidence is probably one of the most corrupt of men. He has been convicted in Maine of an infamous crime, and would be an incompetent witness in that State. But his conviction there does not render him incompetent here. He is a legal witness, whose credibility is to be weighed by the jury. (States his evidence.) This story seems hardly credible, and would be disregarded if it were not confirmed by other evidence in the case. The murder has been committed. It is proved that Mr. White was at his farm with an horse and wagon, and returned in it alone, at the time that Palmer swears it was proposed to upset him and kill him. The house-keeper was to be absent. It is proved that she was absent at the time of the murder. It does not follow, that because a man is of infamous character, he cannot speak the truth. If his testimony is corroborated by other facts proved, it may be believed, notwithstanding it comes from an infamous source. There is evidence that the prisoner said that the thing was done for Joseph's benefit. You will judge whether that statement does not strongly support the testimony of Palmer. The frequent visits of the prisoner to the Crown-inshields are of the same tendency. Do you believe he went there for social intercourse, or that he was there, procuring the murder to be committed. The declaration which Mr. Colman swears the prisoner made, that the thing was done for Joseph's benefit, is urged as strong proof of the conspiracy, and that the prisoner was one of the conspirators. The prisoner said, "I told Joseph, when he proposed it, that it was a silly business, and would only get into difficulty." To what thing did the prisoner refer unless to the proposal to murder Mr. White. Before he made that statement, that subject had been distinctly presented to his mind. He was informed that Joseph had determined to make a confession, and wanted the prisoner's consent. They both knew to what subject that confession was to relate. And it is to be recollected that this

declaration was before any suggestion had been made to the prisoner of any benefit or favor from any course which the prisoner might pursue.

There are various other circumstances proved in the case, tending to establish the points now under consideration, to which I would refer you without particularly stating them.

If you believe that such a conspiracy was formed, and that the prisoner was one of the conspirators, then the declarations and acts of the co-conspirators, as well as those of the prisoner, and the testimony of the other witnesses are to be taken into consideration, to ascertain the part which the prisoner took in the execution of that most wicked project. The extraordinary letter from Palmer to Joseph Knapp may be considered as a declaration made by him to the latter, and the proceedings of the latter to ward off the ill effects which it threatened, are to be weighed in the case. This is a threatening letter from a stranger calling for money. (Refers to it.) How could Palmer have known the particulars which are stated in this letter unless from the Crowninshields? The letters which Joseph sent; one to the Committee of Vigilance and the other to the distinguished relation of the deceased, "to nip the affair in the bud," are to be considered as evidence in the case against the prisoner, if you believe that he and his brother Joseph were co-conspirators. Palmer does not state the part which each was to take. It was to be done in the absence of Mrs. Beckford. But he does not say by whose hand. Then it is to be ascertained what part did the prisoner take? Was it simply to hire Richard Crowninshield, Jr., to do the deed, or did he agree to be near the scene at the time, to be ready or assist if assistance were necessary?

If not, then he had no more to do with it than his brother Joseph, and he cannot be convicted upon this indictment. God forbid that any man should suffer unless he is proved to be guilty in manner and form as his offense is charged against him. If he merely hired Richard Crowninshield, Jr., to perpetrate the murder, and did not go near to the place upon an agreement to aid him in the perpetration, having some

means or power to aid, then he was an accessory before the fact, and not a principal in the crime.

This leads you to the question—was he present, and if so, with what intent?

The government contend upon the evidence that the prisoner was in Brown street at the time that the murder was committed, viz., at about half past 10 o'clock, and that he had been near to that part of Brown street, which opens into Howard street, for some hours before, on that evening. They contend that he was either at the corner of Brown and Newbury streets, or in Howard street, or in Brown street, a little to the westward of Howard street, from about half past 8 o'clock, until the perpetrator met him in Brown street after the murder, between half past 10 and 11 o'clock, when, after a short interview they separated. (States the evidence given by Myrick, Webster, Southwick and Bray.)

Upon the point now under consideration the jury should recollect the difficulty of identifying persons, especially in the evening. It was for the government to prove the fact of presence. It is but fair that the prisoner should have the advantage arising from the difficulty of proving in the night time, and that he was in the places where they contend he was seen by these witnesses. The state of the weather and atmosphere is, however, to be considered; some witnesses, Mr. Chadwick and Mr. Saltonstall, speak of it. The moon was obscured by passing clouds, yet it was so light that Mr. Chadwick recognized the two Messrs. Saltonstalls about three rods off, and Mr. Saltonstall thinks persons of your acquaintance could be seen and known at considerable distance. Consider also the opportunity which the witnesses had of knowing the prisoner. They did not hear him speak, but Mr. Webster says he knew him well and passed him within six or eight feet, that he thought at the time it was the prisoner, judging from his walk and appearance. He thinks now that it was the prisoner, but will not swear positively to the fact.

But the dress of the person described by Mirick and Bray is not like that worn by the person seen by Webster, or South-

wick. Mirick and Bray describe him as wearing a dark frock coat and glazed cap, corresponding with the dress usually worn by the prisoner. Webster says he had a cloak or wrapper on, and Southwick says that the prisoner had a cloak on, when he was in Brown street on the steps of the rope walk.

The government suggest that the prisoner could easily change his apparel, for the purpose of disguising his person, when engaged in such a criminal design.

Mr. Southwick speaks of the identity of the prisoner with considerable confidence. But there is a fact proved in the case which has a strong tendency to impair the weight of his testimony. He was a witness before the Grand Jury at the last term of this court, when there was an inquiry as to the supposed guilt of Mr. Selman, and Mr. Southwick stated that the person whom he saw upon the steps was about the size of Selman. That might be so. But the witness knew as much about the matter then as he does now, and did not state to the Grand Jury that it was Frank Knapp who was on the steps. His evidence then had a tendency to prove that it was Selman whom he saw on the steps. You will judge whether this ought not somewhat to detract from the testimony which he has now given. If he then thought it was the prisoner, how could he as an honest witness leave the impression on the Grand Jury, that it was Selman? If his testimony on this trial were not confirmed by the declaration that he made at the time to his wife that it was the prisoner whom he saw on the steps, the jury probably would not be disposed greatly to rely upon it. But she states, that he did tell her when he came into the house on that evening "it was Frank Knapp."

It has been contended in behalf of the prisoner that the testimony of Mr. Bray is so much stronger upon this than upon the former trial, as to be considered contradictory. The appearance of the witness, and his manner are to be considered by the jury. He states now that he has no doubt but that it was the prisoner whom he saw, and he did not say so before; but it should be recollected that the question was not put to him before. He does not now undertake to swear pos-

itively as to his identity. He says he has reflected upon the subject since his former evidence, and he gives you the reasons which have induced him to form the opinion which he has expressed.

But the counsel for the prisoner contend that all these witnesses who are called to prove that he was in Brown street must be mistaken, because (as they say) the prisoner was in another place, and they refer you to the testimony of four young gentlemen, viz.: Messrs. Balch, Burchmore, Forrester and Page, as well as to Mr. Knapp, Sr., and Samuel and Phippen Knapp, to prove the alibi. (States their evidence.)

The time embraced by the four first witnesses is from about 7 until near 10, and by the three last, from at five minutes after 10, until he went to bed; and if they are not mistaken in the night, and the father and his sons who have testified are not mistaken in regard to the facts of which they speak, the alibi would seem to be proved.

The burden of proof is upon the party who would establish the alibi. You must determine whether it was on the evening of the murder that these young men were with the prisoner—or on some other evening near that time. There is one fact mentioned by Balch, upon which the government much rely, to show that it was on the 6th, which was the night of the murder, but on the 3rd, the Saturday night before. He stated that the prisoner told them that he was going to ride out of town on horseback, and was going to Osborn's to get his horse. And when he came back he said he had been out of town, and that it was "about a twenty-minute ride." There is a charge for a ride on horseback on the 3rd—but none on the 6th. I would refer you to the testimony of the young men, and particularly to their cross-examination, and have the whole to be weighed by you.

In regard to the testimony of the father—can you doubt that he is mistaken? I refer you to the testimony of Mr. Shepard, and of Mr. Treadwell upon this point. He stated to them that he did not know at what hour Frank came home on that night. He spoke to Mr. Shepard, not of his own knowledge—but of what "Phippen had told him." Does he

now know more about it than he did when he had the conversation with those gentlemen? You must consider the testimony of Samuel Knapp in connection with the contradictory evidence given by Mr. Webb; and the testimony of Phippen Knapp in connection with the contradictory evidence in the case, to which I will not now more particularly refer you.

The confession of the prisoner is to be received or rejected according to the opinion you may form upon this question, viz., whether the prisoner did assent to his brother Joe's becoming a State's witness, before he made the confession? If he did, then it is the opinion of the Court that the evidence of his confessions should be rejected. If he did not, then the confessions are evidence to be weighed in connection with the circumstances under which they were made.

The Rev. Mr. Colman states that there was neither assent nor refusal. If there were no assent, the confessions are evidence. If you believe Mr. Phippen Knapp, his brother Frank did assent to Joe's becoming a witness for the State, before he made his confessions—and then, they are to be excluded from your consideration. Then, which of them will you believe? You know the relations in which they stand respectively to the prisoner.

You need not any advice from the Court in regard to the motives which may be supposed to influence them. While I am stating this point, I have no doubt but that the spontaneous suggestions of your own minds are leading you to a correct result upon it. I would remind you that Mr. Colman is contradicted by Mr. Phippen Knapp—but that the latter witness is contradicted materially by Mr. Wheatland, as well as by Mr. Colman.

If you believe Mr. Colman, there is evidence from the prisoner himself, that he was not at home at the time of the murder, but went home afterwards. That he knew who was the perpetrator—the weapons which he used—the particular place of concealment of one and destruction of the other, and the time when the deed was done. Did the prisoner bear a part in it? Could he know these circumstances without having his knowledge from the perpetrator? Did they come into

town upon that evening each to perform the part which had been assigned to him? From whom could the prisoner have been informed before he went home on the night of the murder, that it had been committed? The jury will compare the evidence arising from the confessions of the prisoner (if they are admitted under the rule before stated) with the other testimony in the case, and determine whether he was in Brown street as the government contend that he was—and if so, with what intent he was there? It has been contended on the part of the prisoner, that if he were there, he was not in a situation in which he could render any aid or assistance to the perpetrator at the time of the murder. This is a matter of fact for the jury.

It is proved that the part of the house occupied by the deceased as his sleeping chamber could be distinctly seen from Brown street, and the distance of Brown street from the house of the deceased, and the means of communication with it by the streets or otherwise, have been stated by the witnesses. The jury must judge upon the evidence if the prisoner was there performing his part according to an agreement with the perpetrator, ready to afford him assistance if necessary—by watching—giving notice in any way of the approach of danger, or assisting in the escape, or rendering any aid or assistance which would strengthen the arm and heart of the perpetrator.

The jury will ascertain and apply the facts in the case to the principles of the law as they have been stated. (Recapitulating them.)

You must remember, gentlemen, that all the presumptions of innocence surround the prisoner, until they are removed by the evidence of his guilt.

You must decide upon the evidence as you have heard it within these walls—you will shut out from your minds everything you may have heretofore read or heard upon this subject—recollecting that all reasonable doubts upon any matter incumbent upon the government to prove, are to weigh in favor of the prisoner. With these remarks, I leave the prisoner with his country and his God.

THE VERDICT AND SENTENCE.

August 20.

The cause was committed to the jury at 1 p. m. today, and at 6 o'clock they returned a verdict of *guilty*.

August 21.

The *prisoner* was placed at the bar.

The Attorney General. May it please your Honors: John Francis Knapp has been indicted by the Grand Jurors of the County of Essex, as principal in the second degree in the murder of Joseph White—upon that indictment he has been arraigned and pleaded not guilty—a jury of his own selection has been empanelled and sworn to try the issue between him and the Commonwealth—able and learned counsel have been assigned him by the Court at his request—and the jury, after an attentive hearing of all the evidence and the arguments of counsel, have returned a verdict of *guilty*. The punishment which the law requires is death.

I therefore move your Honors, that sentence of death, conformably to the law, be now pronounced against the prisoner, as a just retribution for his crime.

JUDGE PUTNAM. Have you aught to say why sentence of death should not now be pronounced against you?

Knapp. I have only to say, that I am innocent of the charge alleged against me.

JUDGE PUTNAM. John Francis Knapp, you have been indicted for the crime of murder—and upon your arraignment have pleaded that you were not guilty—and put yourself upon God and your country for trial. Able and learned counsel have been at your request assigned by the Court to assist you in your defense. Your case has been committed to a very intelligent and impartial jury, selected by yourself, who have for six days patiently and attentively listened to the evidence and the arguments. All that learning and industry, fidelity and talents, could suggest, has been urged in vain in your defense. The truth has prevailed—and the jury of your country have established your guilt—the Court is sat-

issued with their verdict, and you come now to receive the sentence of the law.

Before we proceed to that last and painful duty, we are desirous of doing you all the good in our power, by awakening in your mind to a consideration of the awful doom which awaits you. Would to God that anything we could say would have the effect of softening your heart, and of leading you to sincere contrition and repentance.

The horrible murder of which you have been convicted stands in bold relief and deformity in the history of crime.

The victim of your ferocity, in a few years, according to the course of nature, would have sunk into his grave in peace, but for the thirst for gain which corroded the hearts of those who conspired against his life. He was living in the midst of as peaceful a community as exists upon the earth, surrounded by his relations and friends, upon whom he had lavished his bounty. In the stillness of the night—while he rested his aged limbs upon the bed—while he was in the arms of sleep—in his own house—in the center of this populous town—the assassin of your procurement committed the deed of death, while, you, in the judgment of the law, were present and aiding him in the fact.

The circumstances attending the conspiracy exhibit a cool, deliberate design to take the life of the victim, merely for the sake of gain. There was no other passion to be gratified.

The conspirators were all young. They were connected with respectable families. They were born and reared and educated among us. They had the means of living within their control, if they had pursued the course of honesty and industry.

But they forsook this course, and resolved to cut their road to fortune through blood and murder.

Our peaceful city stood aghast at this dreadful deed. The very foundation of our society seemed to be shaken—and the shock was not confined to this vicinity or State, but extended throughout this land.

Suspensions too horrible for utterance were excited in the breasts of reflecting men. The sense of security which the

law inspires was in a great measure lost. No man's house was considered a safe castle—and men seemed for a time disposed to trust to their own arms, rather than to the protection of the law, for their safety.

But there is a Providential watch constantly over us. The murderers have been detected by means as extraordinary as their crime was atrocious. The assassin has perished by his own hands—and the tremendous punishment for your crime is about to fall upon you.

But there is in these awful events a warning voice, which speaks to all, and especially to the young, as with the sound of the earthquake, in every breeze which wafts the news of this horrid tragedy—"Forsake not the ways of truth, and honest industry, which lead to honor and everlasting life, for the paths of vice and profligacy, which lead to ignominy and death. Be not deceived by their enticing appearances. At their beginning, the rosebuds of hope and passion may appear, but they end in anguish, poverty and destruction."

Our fervent prayer for you is, that you may be prepared, by sincere repentance, to appear before the Judge of all the earth. And we would urge you to apply to those pious men whose duty it is to teach our holy religion, to help you with their prayers and instructions during the few remaining days which may be allowed to you; and may God grant success to their endeavors.

It only remains for us to declare the sentence of the law—which is, and this Court doth accordingly adjudge—

That you be carried from hence to the prison from whence you came—and from thence to the place of execution—and there be hanged by the neck until you shall be dead. And may God of His infinite grace have mercy upon your soul.

The *prisoner* was remanded, as soon as the sentence was pronounced, and the court was adjourned *sine die*.

THE EXECUTION.

From the *Salem Register* of Sept. 30, 1830.

On Tuesday last, September 28, the dreadful sentence of the law was executed upon John Francis Knapp, who had been convicted as principal in the second degree in the murder of Joseph White,

Esq., in this town, on the night of the 6th of April last. Some particulars of this mournful ceremony, and the conduct of the youthful criminal, during the last hours of his existence, will doubtless be expected by our readers.

On Monday, he had a second interview in his own cell, with his brother Joseph, which was of long continuance, and they took their last farewell of each other. The elder brother, who is much enfeebled in body and distressed in mind, was overwhelmed with grief and remorse, but the younger sustained the interview with much firmness. His father and other relatives also visited him, and took their final leave of him.

On Monday afternoon, the prisoner requested to be left alone for the night, but the Sheriff considered it his duty to refuse the request, stating to him that there should be no interruption to his devotions or pursuits. Two officers were accordingly placed in his cell, who remained with him till morning. They state that he slept quietly for five hours, and both before and after his sleep conversed freely and with calmness on the subject of the approaching ceremonies, and respecting his trial, etc. He partook of his supper and breakfast as usual.

Very early in the morning of Tuesday, the Right Reverend Bishop Griswold, of the Protestant Episcopal Church, visited the prisoner in his cell, and the venerable prelate continued with him during the remaining hours of his existence. He had requested that all the religious services should be performed in the prison, in order to prevent any delay after he should ascend the scaffold. The Bishop remained an hour in private conversation, prayer and devotion with the prisoner. We learn that during this interview, he was greatly affected, wept much, and conducted with propriety. Just before 8 o'clock, Sheriff Sprague announced that all the arrangements were completed, and asked the prisoner if he wished any delay. The prisoner requested that he might be allowed another half hour, which was granted. During this time, a young man, who had come with a message from the family, was admitted to the cell. At half past eight, the prisoner was conducted from the cell by the Sheriff and his deputies—at the prison door, he put his hands behind him and submitted to be pinioned with great composure—walked to the scaffold, on the north side of the prison yard, about 100 feet distance, accompanied by the Bishop, and attended by the Sheriffs; his step was firm, his appearance calm and his countenance unmoved. As soon as he arrived upon the scaffold, he tried the drop with one foot before ascending it; then placed himself in a situation to allow the noose to be adjusted, which was immediately attended to by one of the Deputy Sheriffs. He was very neatly dressed in a dark cloth frock coat, blue pantaloons, light vest, boots, etc. He had a white handkerchief in the breast pocket of his coat, which he took in his hand and held there till his death. He was very pale and appeared precisely as in court. He did not look much about him, but turned his body by direction of the officers, after his legs were tied, so as to face the officer who read the death war-

rant. The Sheriff then asked the prisoner if he had anything to say—he said “No” (the only word he spoke upon the scaffold)—and instantly the drop fell. The neck was bare, the noose adjusted with great pressure, and his sufferings were apparently short. For half a minute there was not the slightest motion of the body. One or two slight convulsive motions were afterwards observed, and in three minutes he was to all appearances dead. It was sixteen minutes before nine when the drop fell; he was suspended a little more than forty minutes, when he was taken down by the officers, put into a coffin which had been placed under the gallows, and carried into the prison. The body remained there till 1 o’clock, when it was delivered to the family, and in the evening was decently interred.

The number of spectators who witnessed this dreadful scene was thought to be remarkably small, compared with the usual collections on similar occasions. It was judged that not more than three or four thousand were present, and a very small proportion of these were inhabitants of the town. We were in hopes that we should have it in our power to announce, on this occasion, female curiosity for once, had so far given place to their better feelings, as to enable them to absent themselves entirely from a scene like this. But we were disappointed. Several hundred females were noticed among the crowd, most of whom, however, were strangers, and many of whom, we were informed, came from a great distance to witness this execution!

The judicious arrangements for the awful ceremony we have narrated, and the prompt and careful manner with which they were carried into effect, by the High Sheriff and his assistants, have received universal approbation. The whole business was conducted without the least parade or display; not a single armed guard was employed—the peace officers of the town, and a few extra constables, were alone designated to preserve decorum, and yet there was not the slightest disorder, or the least impropriety of conduct amongst the crowd. Before 10 o’clock, the vicinity of the prison was nearly cleared of spectators, and they had retired peaceably to their homes. Everything was conducted with the utmost decency, and the deportment of the spectators was worthy of praise.

J. J. Knapp, Jr., requested permission to see the corpse of his brother while it remained in the prison, and the request was granted. The scene was truly a distressing one. The wretched survivor kneeled to embrace the lifeless features of his brother, and the agony of his feelings was so intense, that he fainted as soon as he returned to his cell.

The young man who has thus paid the forfeit of his life for his participation in one of the most atrocious deeds ever perpetrated by man, completed the twentieth year of his age on the fifth of this month. It is understood that he has left some statements in writing in the hands of his friends; but we have as yet learnt nothing of the nature of them, excepting that he denies the truth of some of the evidence given at his trial, and affirms that he was not guilty of all that was charged against him.

**THE TRIAL OF JOSEPH JENKINS KNAPP, JR.,
AS AN ACCESSORY IN THE MURDER OF
JOSEPH WHITE, SALEM, MASSA-
CHUSETTS, 1830.**

THE NARRATIVE.

A little over a week after his brother perished on the scaffold, Joseph J. Knapp, Jr., was brought to trial. He it was who had at first made a full confession of the whole matter under a promise of pardon and who, when called to the stand to help convict his brother, refused to open his mouth. He had thereby forfeited the immunity promised him by the Government, and was now on trial himself for his life. On the trial of John F. Knapp, Mr. Webster had convinced the jury that the prisoner was *present* at the commission of the murder by Richard Crowninshield, who had hanged himself in his cell and was beyond any earthly tribunal. But in the present trial, Mr. Webster's task was of an entirely different nature. Joseph J. Knapp could not be convicted without the use of the confession which he had made under the promise of favor. Mr. Webster had to satisfy the Court that the confession was admissible, although made under these circumstances. He argued that as against himself the prisoner's confession was admissible, because made freely and voluntarily; for, having obtained the Attorney General's promise of immunity before he made it, he had no motive falsely to accuse himself, although he might have a motive falsely to accuse his accomplices. The Court agreed with him and allowed the confession to be read to the jury. Mr. Webster then persuaded the jury that the confession was true; they returned a verdict of guilty, and Joseph J. Knapp was hanged also.

THE TRIAL.¹

*In the Supreme Judicial Court of Massachusetts, Salem,
November, 1830.*

HON. SAMUEL PUTNAM, ²	} Judges. ³
HON. SAMUEL S. WILDE, ³	
HON. MARCUS MORTON, ⁴	

November 9.

JUDGE PUTNAM, the presiding judge, charged the Grand Jury, and the Right Reverend Bishop Griswold offered prayers for guidance in the deliberations and business of the Court.

Perez Morton,^{5a} Attorney General; *Daniel Davis*,⁶ Solicitor General, and *Daniel Webster*,⁷ for the Commonwealth.

*Franklin Dexter*⁸ and *W. H. Gardiner*,⁹ for the Prisoner.

Attorney General Morton moved that Joseph Jenkins Knapp, Jr., indicted as an accessory in the murder of Joseph White, should be brought to the bar, and arraigned on the indictment.

The Prisoner was brought in, when the indictment was read by the Clerk.

The indictment contained six counts. The first and second charged John Francis Knapp alone as principal in the first degree, and Joseph Jenkins Knapp and George Crownin-

¹ *Bibliography.* "Salem Register, November 11, 15, 18, 1830; Vol. 10, Pickering's Massachusetts Reports, and *ante*, p. 404.

² 1 Am. St. Tr., 108.

³ 4 Am. St. Tr., 99.

⁴ See *ante*, p. 405.

⁵ Chief Justice Shaw having been retained as counsel for Selman (one of the persons originally charged with a participation in the murder of Mr. White, and who was afterwards discharged, no bill having been found against him by the Grand Jury), and having consulted with the counsel for the other prisoners in relation to their defense, deemed it improper to preside at the trials in relation to that murder, and did not take his seat on the bench at this term.

^{5a} See 1 Am. St. Tr., 109.

⁶ See 2 Am. St. Tr., 551.

⁷ See *ante*, p. 414.

⁸ See *ante*, p. 414.

⁹ See *ante*, p. 414.

shield as accessories. The third and fourth counts charged Richard Crowninshield as principal in the first degree, John Francis Knapp as principal in the second degree, and Joseph Jenkins Knapp and George Crowninshield as accessories to both of the principals. The death of Richard Crowninshield by suicide, so that he could not be held to answer for the murder, charged a person, to the jurors unknown, as principal in the first degree, John Francis Knapp as principal in the second degree, and Joseph Jenkins Knapp and George Crowninshield as accessories to both of these principals.¹⁰

Mr. Gardiner suggested that he was bound to plead to the first and second counts only, as neither Richard Crowninshield nor "the person unknown" had been convicted. *Stoops v. Commonwealth*, 7 Serg. & Rawle, 491.

The COURT ruled that, so far as he was charged in the various forms in the indictment, as accessory to the murder committed by J. Francis Knapp, he was bound to answer.

He pleaded *not guilty*.

The Clerk proceeded to impanel the Jury. When the whole number of Jurors returned had been called (forty-eight) only ten had been sworn to try the case—*thirty-two* having been challenged for cause (having expressed or formed an opinion as to the guilt or innocence of the prisoner), five peremptorily challenged, and one excused. The Sheriff was directed to order talesmen from the spectators to complete the jury—and after calling upon seventeen, who were sworn and interrogated as to having formed an opinion, two were at length found who stated under oath that they had not made up their minds and were under no bias, in regard to the prisoner. The names of the Jurors impanelled are as follows: Day Emerson, Foreman; William S. Walsh, George Barker, Jr., John Choate, Jr., Morrill Currier, Jonathan Hassam, Joshua Hewes, William Hersey, Elijah Kimball, Jonathan K. Smith, John Lefavor and Daniel Wardwell.

Immediately after the jury were impanelled and a foreman appointed, *Mr. Morton* stated that he had learned, since one of the talesmen was sworn, that he had said that J. Francis Knapp, the alleged principal in the murder, ought not to have been convicted. He therefore moved that a new talesman should be substituted. He urged that the Statute 1807, c. 140, 9, authorizes the Court to inquire whether a Juror is sensible of any prejudice in the case, without any limitation as to the time when such inquiry shall be made.

¹⁰ J. Francis Knapp was tried and convicted in August last. See *ante*, p. 395.

Mr. Gardiner contended that the objection should have been made before the Juror was sworn; and he cited 2 Hale's P. C. 270, 274; 1 Chit. Crim. Law, 545 (Amer. ed. 444).

Mr. Webster said, that in civil cases, according to our practice, challenges are made after the jury have been sworn, for they are sworn but once for the trial of all actions which may come before them; and the statute above cited makes no distinction between civil and criminal cases, as to the point in question. The case is the stronger, inasmuch as there is no opportunity to make inquiries respecting a talesman previously to the trial.

The COURT. At common law the Court cannot interfere after the Juror has been sworn, and we think that our statute did not intend to make any alteration as to the time of inquiring into the Juror's impartiality. The objection to him must be made, as well by the Commonwealth as by the prisoner, before the Juror is sworn; or at least before the jury are impanelled.

Mr. Dexter raised an objection to the employment of counsel for the prosecution in addition to the law officers of the Government. He referred to St. 1807, c. 18, which requires county attorneys to act in behalf of the Commonwealth, "provided, that the attorney general, if present, shall, in any court, have the direction and control of prosecutions and suits in behalf of the Commonwealth." The second section provides "that no attorney general, solicitor general or county attorney shall receive any fee or reward from or in behalf of any prosecutor, for services in any prosecution, to which it shall be his official duty to attend." He objected that as both the attorney general and solicitor general were present, and neither of them disabled to conduct the prosecution, *Mr. Webster* ought not be permitted to act in behalf of the Commonwealth. They had understood that he was to receive a compensation for his services from a private prosecutor, and they questioned the right of a private individual to retain counsel to aid the law officers of the Government in effecting a conviction for a crime punishable with death.

Mr. Morton remarked that it was not a novel practice for the prosecuting officers to call in the aid of other counsel.

Mr. Davis said the counsel for the Government would be greatly embarrassed if *Mr. Webster* were not permitted to act in the case, as the preparation for the trial had been made under the expectation of his assistance.

Mr. Webster stated that he appeared solely at the request of the attorney general, and without any pecuniary inducement.

The COURT said it would make a ruling on this point in the morning.

The COURT suggested the parties might employ the time by explaining the grounds on which they intended to proceed in the trial of J. J. Knapp, Jr., as an accessory.

Mr. Morton stated that after the arrest of the two Knapps and the two Crowninshields named in the indictment, he gave a written authority to Rev. Henry Colman to receive a confession from

any one of them except Richard Crowninshield, pledging the faith of the Government that the one who should become State's evidence should be protected; that upon such promise the prisoner at the bar made a free and full disclosure, and promised to testify against his accomplices, but that in the trial of J. Francis Knapp he refused to testify. He now proposed to give the written confession in evidence, which stated that the prisoner's "being a witness will be a pledge of the Government that he will never be prosecuted for this offense."

The COURT said it would hear evidence as to the manner in which the confession was obtained, and *Mr. Morton* called *Rev. H. Colman*.

Rev. Mr. Colman. First heard of the arrest of prisoner on the 27th of May. Next morning, consulted with some gentlemen of the Committee of Vigilance in regard to visiting the prisoner as to the charges against him. Went to his father's house and saw there Mrs. Knapp, Mrs. Beckford, and soon after Captain Knapp, Sr., came in; Samuel and Phippen Knapp were also present. After some conversation I went to the jail to see the prisoner, with their knowledge and approbation. Went to Joseph's cell, told him I was much distressed to see him in that situation, and that if I could render him any services proper for me to render him, he might command them. He asked me if I thought they could prove it—meaning the charge against him of being concerned in the murder. Told him I did not know anything about it, other than what some gentlemen in whom I had confidence had told me, which was, that in their opinion, the evidence was conclusive against him. Asked him who Palmer was. He said he did not know. I observed I did not know what could be done, but if anything could be obtained for him, and if he saw fit to rely upon

my honor to make any disclosures to me, they should never be divulged. I would die first, until I should obtain security for him from the Government. At that time I thought a confession to a clergyman was sacred. I charged the prisoner, if innocent, by no means to involve himself—he must be the judge of that. He asked me again if I thought they could prove it. Said I did not know; observed that he frequently looked up to the wall, where there was a crevice through it. He appeared anxious not to be overheard—he said George Crowninshield was overheard, and had let down a pencil and paper through the wall, by which means they had had communications. Little else passed at this first interview. When about to go, he asked me if I would see his wife, and return again; went to the house of his father, and there saw the same persons as before. Returned to the prisoner about 3 P. M. of the same day—very much the same conversation passed, with the addition that the gentlemen referred to as having expressed opinions on the evidence against the prisoner, had authorized me to give him their opinion that the evidence

against him was decisive. He asked me what I thought. I told him I did not know, but thought it would be very difficult for him to account for the two letters sent by him to the Pose Office, (I had received information of these letters in the interim). He asked me if I thought they would bring Palmer up, and understood he asked me on the suggestion of one of the persons confined above, Richard or George Crowninshield; told him I thought they would. I then said to him I was much exhausted, being oppressed with grief and anxiety, and could do no more; I would offer him no bribe, would use no persuasion, he must act on his own responsibility; I had discharged my conscience. After sitting a few minutes in silence, I got up to leave him, and when at the door, he asked me if I would see his father and brother and come with them to the prison; told him I would, and made an appointment with the jailor to let me in at 5 o'clock same afternoon. Saw his father and brother and mentioned to them his request. They desired me not to go again, because it would be said Joseph was making a confession. In compliance with their request, did not intend to go again; but having gone accidentally near the jail, in consequence of seeing Mrs. Knapp and Mrs. Beckford going towards the jail in a chaise, I was repeatedly requested by Joseph, through the jailer, and by Capt. Knapp, to go in, and I went. At this third interview I stated to prisoner that I had seen a letter from the eastward respecting Palmer, and if anything was done, it must be done that day;

also stated to him that I had consulted counsel in regard to the effect of a confession, whether he would be secure, if no person should be convicted, etc., and that Mr. Merrill gave it as his opinion that he would be secure in such a case. I showed him a letter from the Attorney General promising the Government protection and I told him that this was on the sole condition that he should make a complete and exact and full disclosure of every circumstance connected with the event and that in case of any refusal to answer touching any topic known to him or of any evasion, equivocation or designed contradiction or withholding of testimony, he was not to receive the benefit of the promise. He then beckoned to me to go into a corner of the cell, and in a low tone of voice made the disclosure to me without compulsion, bribe, calculation or any inducement whatsoever other than the pledge of the Government as contained in the letter of the Attorney General. I said to him I would do all in my power to obtain for him the privilege of being State's witness. I afterward received a letter from the Attorney General offering to any one of the prisoners (except Richard Crowninshield) the privilege of being State's witness, who would make a full and free disclosure of the circumstances of the murder. The written confession now offered by the Attorney General is in my handwriting, contains the prisoner's signature, and was freely and voluntarily given, after I showed him the Attorney General's offer.

NOVEMBER 10.

JUDGE PUTNAM: The Court have considered the application of the Attorney General for the admission of Mr. Webster to assist him in the management of this Cause. The Counsel in behalf of the prisoner object, and contend that the stat. of 1807, ch. 18, revised by stat. 1811, ch. 10, respecting the offices and duties of the Attorney General, Solicitor General and County Attorney, makes it their duty exclusively to conduct the prosecutions on the part of the Commonwealth.

We have examined that statute and are of opinion that it was not intended to prohibit the appointment of the Counsellors of this Court in aid of the law officers whenever the circumstances of the case should require the Court in the exercise of a sound discretion to make such appointments. It is one of the incidental powers of the Court, and has heretofore been exercised in cases within our own recollection. In cases where civil rights are in controversy and the form of proceeding is by indictment or information, the Court do not perceive any objection that the party in interest should employ Counsel in aid of the law officers.

The same reasons would not apply to cases involving public considerations only. In such cases the statute supposes that the prosecution shall be conducted by the law officers, for their salaries, and without any other compensation whatsoever.

In the present case the learned gentleman avows that he is induced to aid the Attorney General merely at his request, and without any other consideration. So that this case presents the question whether a Counsellor may, at the request of the Attorney General, be admitted to aid him in the prosecution, without any pecuniary consideration being paid to him, or any other consideration which may be supposed to influence him, excepting a disinterested regard for the public good. And we all think that under these circumstances the application should be granted.

It is to be recollected that at the trial of John Francis Knapp, Mr. Webster was at the request of the law officers appointed to aid them, and that there was no objection then made by the prisoner or his Counsel. And although that appointment strictly was for the then pending trial, yet if the other trials had followed immediately, the Counsel for the Government would have had reason to suppose that they were to receive his assistance in those trials, unless good objections should have been made. It is said by the law officers that the preparations for this trial have been made under a similar expectation on their part, and no objection was made to this measure until the jury were empanelled.

It is to be understood that the Solicitor General concurs in this application on the part of the Attorney General, and that two gentlemen only are to address the jury in the case in behalf of the Commonwealth. It is further to be understood that the "direction and control of the prosecution" is to be with the Attorney General, who acts under oath, and upon his official responsibility.

We give no opinion upon any application of this nature under

any other circumstances than such as are found in the case now before us.

Mr. Gardiner said that the statute required that there should be no fee or hope of reward to stimulate the exertions of the prosecuting counsel. The objection in this case arose from the belief that the assistant counsel was retained and fed by a private individual. The objection falls to the ground if this is not the fact.

Mr. Dexter observed that he did not understand *Mr. Webster* to have said he received no fee from any private individual, and, if he were wrong, he should like to be set right.

JUDGE WILDE said he distinctly understood *Mr. Webster* to say that he came solely at the request of the Attorney General, and had no other inducement.

Mr. Dexter said he should like to know whether *Mr. Webster* expected any fee from any private individual.

Mr. Webster said if it would make it any stronger, he would repeat it.

Mr. Dexter said he was satisfied.

The COURT again decided, in reply to the Attorney General, that no objection to a Juror could be raised after he was sworn.

The Attorney General offered in evidence the written confession only, and not the oral disclosures made by the prisoner before he had received the promise of the Government.

Mr. Gardiner objected that the confession could not be admitted in evidence, because it was not made voluntarily, but upon a promise of favor. It is contended, that if a confession is made by an accomplice, upon a pledge of the favor of the Government, and he afterwards refuses to testify the confession becomes admissible against himself. If the true reason for rejecting a confession made upon a promise of favor is that it is not credible, a breach of contract in the party confessing can not render it credible. The contract with the prisoner was, that if he would testify against his accomplices, he should not be prosecuted himself. He has refused to testify, and we admit that he has thereby forfeited his title to favor, and is rightfully put upon his trial; and this must be the whole penalty for his breach of contract. In *Christian's* note to 4 Bl. Comm. 331, it is said, that upon a trial before Buller, J., the accomplice, who was admitted a witness, denied in his evidence all confession and other circumstances; he was convicted. It does not appear that such confession was not voluntary. *Starkie* (on Evid., vol. 2, p. 23,) says that "by a breach of the condition the accomplice forfeits his claim to favor, and is liable to be tried and convicted upon his confession." The authority cited by him is the case of *Rex v. Burley*, where the prisoner made a confession after a representation made to him by a constable that his accomplices had been taken into custody, which was not the fact. Such a confession would have been admissible in evidence, under the general rule, for it was made without any threat or promise of favor.

Mr. Webster. The question respecting the admissibility of

Knapp's confession has never arisen before in the United States, but I am impressed with the conviction that it is clearly admissible, according to the best English authorities. Between the confession made by a man, of his own crimes, and a gratuitous disclosure implicating others, there is a wide difference. In a simple confession, it is supposed he may be influenced by hope of reward, of favor, or fear of punishment. He may divulge or withhold whatever he thinks may promote his own interest. But in disclosures, made under offer of indemnity, the prisoner is not at liberty to disclose or to refrain from doing so, at his option. He must tell the whole truth. And from the circumstances in which he is placed, it is to be presumed that he does speak truth. The moment he receives assurance from the government that he shall not be prosecuted, he is beyond hope or fear; he is as secure as if pardoned. The practice in this country places the defendant much farther beyond hope or fear, than the practice in England. There the prisoner can only receive the assurance of the Justice of the Peace who commits him, that he will recommend that his testimony may be received, which recommendation may be overruled by the Court. In this country the public prosecutor has the absolute power of preventing his ever being brought to trial, and thus securing him perfect indemnity, and placing him beyond the reach of hope or fear. He can be thrown back into a state of uncertainty only by departing from the truth. What motive induced the defendant to adopt this course, and violate the pledges which he had given to the government in return for the assurance which he had received? Truth was the only condition of his safety. Everything depended upon his telling the truth.

Why should the evidence of a criminal be admitted against others, when not good against himself? The principle would deprive the law of one of its most important prerogatives, and greatly impede the administration of justice. A man might receive this assurance of indemnity on condition of his turning State's evidence, alter his mind, and refuse to testify on the stand against his accomplices. They are consequently acquitted for want of evidence, and he then comes forward and claims his privilege, on the strength of which he is acquitted, and nobody is brought to justice.

The objections which exist to receiving the confessions of a man not certain of his fate, have no bearing upon the disclosures made by the prisoner at the bar. Lord Mansfield says, if a prisoner make confession implicating his accomplices, on receiving promise of indemnity, and when brought into Court, refuses to testify, fails to disclose the whole truth, or falsifies in the minutest particular, he must be hanged on his own confession. Modern usage has modified the rigor of the ancient law so far, that if the prisoner demonstrates the honesty of his intentions, he is allowed to go clear. The ancient law allowed not the slightest accidental discrepancy. If he did not testify in Court precisely as he had confessed elsewhere, he was hanged on his own confession. The meaning of confession in this case is obvious. The prisoner is convicted on that

confession which, if adhered to, would have saved him. Learned men would not waste words to show that a man might be hanged on his own confession of individual guilt. Everybody knows that. But they mean to say that a prisoner who makes such disclosures as to induce the Government to give him assurance of indemnity, and then violates the pledge on his part, may be hanged on his former confession. Judge Christian relates a case of a man thus circumstanced, who, when brought upon the stand, refused to abide by his former confession, whereupon the Judge ordered a new indictment to be found, and he was convicted upon his former confession. Starkie relates the case of a man who made confession of his guilt in consequence of a constable having falsely represented to him that his accomplices were taken, but having discovered the deception, denied all previous confession and refused to give evidence, yet was convicted upon his confession. It is true, this case is only given in a note, and has not found its way into any volume of reports, but its authority has never been questioned or doubted by any. Moreover, there is no opposing authority. Cases of this kind must have been constantly occurring in England, and if the objections raised in this case were sustainable, it could certainly be shown.

The English Courts and this Court say, that whatever a man confesses under the excitement of hope or fear, is not to be received in evidence. But no threat of consequences or hope of immunity was held out to the defendant at the bar, to induce him to confess. The whole thing originated with him and his friends. Indeed, it may be said to have originated with the defendant personally. The first thing we hear of is his asking Mr. Colman whether he thought they could prove it. Prove what? Mr. Colman had not charged him with guilt. The conversation began with himself, and with the supposition that he needed the mercy of the State. Mr. Colman uttered neither threat nor promise in the technical acceptation of the words. No promise, except that he would keep his secret inviolable. He gave him no advice to confess, and in reply to a question of the defendant, told him he did not know what course was best for him to adopt; but offered his confidential services.

The mere communication of facts, or other conversations, would not rule out the confession. There must be an inducement. The mere statement of the fact that Palmer was confessing and had made application to be admitted as State's evidence, is no valid objection to the admissibility of his disclosures. It was true. To shut out confessions on this ground, would exclude all disclosures made on knowledge of facts. To say that a confession should not be received because the party was acquainted with facts, would be strange doctrine. No doubt the prisoner was assured of the services of the witness in procuring him indemnity, if possible. The last interview, at which the prisoner did confess, was sought by the defendant himself. Mr. Colman strove to avoid it, and was twice sent for before he went into the cell. He did not tell

defendant it would be better or worse for him to confess, but told him he must act on his own responsibility; and when carrying the offer of indemnity from the government to him, told him it was given upon the sole condition that his confession should be full and explicit, and that if it were not so, if there was any withholding, denial, or contradiction, it was not to avail him.

Mr. Dexter said this was a question of great importance, and he regretted to be obliged to reply entirely without preparation. It was so difficult to take up and follow another's arrangement. It had been urged against the recognition of the rule of law which would exclude the confession of prisoner, that it would lead to public inconvenience and injury, by sometimes preventing the conviction of the guilty. True; but the same may be urged against any rule of law protecting the prisoner. It is acknowledged to be settled that no confession induced by any promise or threat can be received; but it is contended that the confession in this case could not have been obtained by any such consideration, because the prisoner was in perfect safety at the time of making it. Wherein does this differ from common cases of involuntary confession voluntarily reported? We have a right to show that it does not differ at all, and that the circumstances attending the verbal confession were such as to taint the posterior one in such a manner as to prevent its being received. Nothing occurred to give the latter a different character from the former, and the question recurs, what was the inducement to the first confession? The doctrine which it is desired to introduce in this case is precisely the old doctrine of approvements, not modified according to the modern practice, as is contended, but in all its unmitigated severity.

No case in the English books touches this, except that of Hall, 2 Leach, 636. If a statement is made to a prisoner, which has a tendency to excite hope or fear in him, that rules out his testimony; but the truth or falsehood of the information so given has no effect on the admissibility of his confession. A confession made under expectations excited by another is not a voluntary confession, whether the expectation be of government indemnity, or any other benefit. The admission of a prisoner to testify amounts to a recommendation to favor; and if he refuses to perform his agreement, he forfeits all claim to favor on that ground. Here is a hope and a fear. We are willing our case should stand upon this ground. The contract with government is forfeited by the prisoner's own act, but this does not authorize them to introduce evidence not otherwise allowed. If he is put upon his trial and executed upon evidence that could not have been admitted under other circumstances, he is then executed, not for being accessory to the murder of Mr. White, but for breaking his contract with the government.

It cannot be said with justice that no inducements were offered the defendant which ought to cause this evidence to be ruled out. Mr. Colman's offer of aid must have meant, I will do all in my

power to extricate you from your perilous situation. From whom did the proposition to confess proceed? Not from the defendant; he was led into it. The remark of Mr. Colman that he would not divulge what defendant should communicate to him, except for the purpose of procuring an indemnity from government, amounted to a promise that he would use all his exertions to procure such indemnity. At the second interview between that gentleman and the prisoner, Mr. Colman told him that certain gentlemen in whose opinions he had confidence, thought there was evidence enough to convict him; that Palmer had applied and would probably be admitted as State's evidence; that he did not know what could be done with respect to admitting Knapp as State's evidence, but that he would do for him all that he could. Here are inducements. If the verbal confession was not a credible one under these circumstances, no subsequent repetition can render it admissible.

PUTNAM, J. The Court will rule on this question tomorrow.

Mr. Dexter said that it was necessary to go over the whole ground occupied in the trial of John Francis Knapp, to prove as well that he was actually a principal in the murder as that the prisoner at the bar was an accessory. He would not dispute that Mr. White was found dead in his bed, but would deny that John Francis Knapp was present, aiding and abetting in his murder.

MORTON, J. You have a right to show that John Francis Knapp was not a felon himself, or was innocent of the particular crime for which he suffered, but no further. A record of conviction is all that is necessary to prove the guilt of the principal.

The Attorney General contended that the record of his conviction was *prima facie* evidence that he was a principal, but he admitted that the prisoner might show that the offense committed did not amount to a felony in the principal, or not that species of felony with which he was charged, or that he was manifestly innocent. Haws, P. C. bk. 2, c. 29, 47, Leach's note (4); McDaniel's case, Foster, 121, and 10 State Trials, 417; Foster, 363, 365, 366; 1 Russell, 55, 56; Smith's case, 1 Leach, 323, case 136.

Mr. Dexter. So far as it is necessary to show the fact of a conviction of the person charged as principal, the record is evidence and conclusive evidence; but no further. As against the accessory, it is no proof of the guilt of the principal. It is *res inter alios acta*, and does not cast the burden of proof upon the accessory. If the principal and accessory had been tried at the same time, the accessory might have availed himself of all matters of fact and of law to show that the principal was not guilty. This prisoner has a right to ask the Jury to consider, on the whole evidence, whether the former Jury came to a right conclusion. In addition to the authorities before cited, they referred to 1 Chit. Cr. L., 577, (Am. edit. 470); 1 Stark Ev. 224; Archb. Crim. Pl. 398, 399; 1 Stark Crim. Pl. (2d edit.) 309.

Mr. Dexter. We will offer evidence in regard to the place at which the principal, as was contended by the Government upon his trial, was stationed during the perpetration of the murder, our object

being to show that in that situation it was impossible for him to aid and abet the person who was actually striking the blow.

Mr. Webster. It is a question for the discretion of the Court, how far evidence respecting the principal is to be introduced. We admit it is difficult to fix the limitation. We apprehend that the whole question of his guilt is not open, as though there had been no trial. The conviction is *prima facie* evidence that he was present, aiding and abetting, and it is necessary to prove incontestably some new fact that is incompatible with his guilt. If the conviction is to go for nothing and the former question is to be retried, the consequence must be that, as the confessions of the principal are not evidence against the accessory, in all cases where the guilt of the principal cannot be proved without the aid of his confessions, the accessory must be acquitted.

PUTNAM, J. The Court are aware of the difficulty of the question, and they are unable to apply any definite limitation to the admission of the evidence. The verdict is to be taken as *prima facie* evidence of the guilt of J. Francis Knapp. It may be rebutted by showing that there was no murder, or that Francis was not in a situation where he could take a part as a principal. We cannot stop the evidence offered, *in limine*. The prisoner has the burden of proof. He must show the Jury that Francis ought not to have been convicted. He is not to make the propriety of the conviction questionable merely; he must prove it to have been clearly wrong.

The examination of witnesses was commenced, and the same course of examination took place, and the same evidence was given, as at the trial of J. F. Knapp. The witnesses examined were

Benjamin White, Lydia Kimball, Catherine Kimball, Henry R. Deland, Lewis Endicott, Dr. Johnson, J. W. Treadwell, Benj. Leighton, Thomas Hart, Mr. Lummus, and Rev. Mr. Colman.

November 12.

PUTNAM, J. The law is clearly settled, that the confessions of a party freely and voluntarily made, are to be received against him as competent evidence. The difficulty in administering this part of the law, is not so much in regard to the rule, as in the application of the facts to the rule; in other words, in ascertaining from the facts and circumstances, whether the confessions were free and voluntary, or whether they were procured by the influence of another, under a hope of favor or advantage if they were made, or fear of harm or disadvantage if they were withheld.

The Government propose to give in evidence against the prisoner his confession which was made in writing after he had received the assurance of the Attorney General that he should not be prosecuted, if he should testify truly upon the trial of his accomplices. And it is stated by the witness that the confession was deliberately made, and reduced to writing in the presence of the prisoner, and subscribed on each leaf by the prisoner with his

own hand. That confession is competent evidence unless the prisoner can show that it was obtained under an improper influence of fear or hope excited in the mind of the prisoner at the time when he made it. And it is contended in his behalf, that such influence was brought to bear upon him, by the witness, in the various communications which he had with the prisoner before he obtained the protection of the Government.

We must attend to those circumstances, in order to determine the validity of the prisoner's objection.

And here we must distinguish between the verbal communications which were made by the prisoner to the witness, before he made the application to the Attorney General, and the written declarations and confessions which were made after the protection was obtained. The Government do not offer those verbal confessions, but would confine the evidence of confession to the facts which were reduced to writing.

But it has been urged by the counsel for the prisoner, that although the written confession was voluntary, and not induced by persuasion or any external influence, yet if the first confession was not voluntary, the subsequent confession is also inadmissible.

The principle undoubtedly is that, if a confession is procured by threats or promises of favor, all subsequent confessions of the same fact are to be excluded; and the reason given is, that the subsequent confessions may be presumed to be induced from the same motive of fear or hope; and therefore, if it is shown that such motive has been removed before the subsequent confessions are made, this will rebut the presumption and render the subsequent confessions admissible.

When Mr. Colman went into the cell of the prisoner, he said to him, that "he was very sorry to see him in that situation, and if he could render him any services in his power, proper to be rendered, the prisoner might command them." The prisoner then inquired of the witness "if he thought they could prove it." He answered that "he did not know anything about it, other than what certain gentlemen in whom he had great confidence had told him, which was, that in their opinion the evidence would be conclusive." The remark mostly relied upon by the counsel for the prisoner, as influencing the verbal confession, was the following. The witness said that "he did not know what was to be done, but if anything could be obtained for him, he thought fit to rely on the witness's honor, to make disclosures to him, they should never be divulged; the witness would die first, until he had obtained the security of the Government."

Now, if the inquiry were confined to the verbal declarations which followed this proposal of the witness, the Court are all clearly of opinion that they were made under the hope of obtaining the privilege of being made a witness for the State, under the influence which the witness excited in the mind of the prisoner. If the matter had stopped there, the disclosures made upon that solicitation, and under that hope of favor so excited, would seem

clearly to be incompetent. But the matter did not stop there; for in consequence of the verbal communications which the prisoner made to the witness, the witness did apply to the Attorney General, and did procure for him the desired protection of the Government.

The prisoner had then obtained all that he hoped for, viz., the consent of the Government to be a State's witness. He might take the benefit upon the terms offered or he might refuse to do so. And he was left to the free exercise of his own judgment.

Now, in the present case it is clear that the motive supposed to have induced the first confession was completely removed, and must have ceased to operate before the written confession was made. The prisoner had in his possession the letter of the Attorney General, promising the protection of the Government, on condition of his making a full disclosure, and testifying in the case fully and truly. The benefit was offered "upon the sole condition that he should make an explicit, exact and full disclosure of every circumstance connected with the event referred to;" and he was informed "that in case of any refusal to answer touching any topic known to him, or of any evasion, equivocation or designed contradiction or withholding of testimony, he was not to receive the benefit." To that he assented.

The witness further stated, that he did not refer to the verbal disclosures which had been made, but to the statements and testimony which the prisoner was thereafter to give upon the trials of his accomplices. He was to make a full confession of all the facts in the case, and to answer any questions which should be put to him by proper authority. This was fully explained to the prisoner, before he made the confessions which are now proposed to be given in evidence. A night had intervened after the witness left the prisoner to make the application to the Attorney General, affording the prisoner time for reflection; and he deliberately proceeded to make his confession in writing, under these explanations and circumstances. The witness did not persuade him upon the subject. If the verbal disclosures were made under the influence of hope excited by the witness, the written confessions were made after that hope had been realized. He was safe if he would be true and faithful in the performance of his engagement. He had solicited and obtained the protection of the Government, and was at liberty to accept it upon those terms, or to stand upon his defense.

We cannot perceive how the prisoner, thus situated, could have any motive falsely to accuse himself, although he might have a motive to continue his false accusation against his accomplices. And besides, if any such motive could be supposed to operate, it was a new motive, and not arising from external influence. And it is no objection to the admission of a confession, that it was made from interested motives and with the hope of favor, if the motive is not excited by external influence.

If the accomplices had been upon trial, it is clear that the testimony of the prisoner would have been competent against them.

It would be liable to great observation, and its credibility would be the fair and just subject of argument. But still it would be competent. And yet the motives which could operate upon his mind would be strong, to magnify the evidence against his accomplices, but he would have no motive to criminate or accuse himself beyond the truth.

The confessions which are now offered in evidence were made deliberately, in part-execution of the prisoner's agreement. But upon being called to testify upon the trial of John Francis Knapp, he refused to do so.

By his refusal to testify it is admitted that he has forfeited all claim to the extraordinary favor of the Government. But in what did that favor consist? It was in not using his confession against himself, if he would conduct himself faithfully as a State's witness. By his refusal the Government are absolved; and it is now contended that the prisoner is absolved also, and that his confession cannot be used against him, notwithstanding his refusal.

Persons who are properly admitted here as State's witnesses are substantially in the same situation as persons in England who are properly admitted to become witnesses for the Crown, against their accomplices. The protection of the Government is extended upon the same terms, although the forms of proceeding are somewhat different. There, if the witness for the Crown conducts himself fairly and makes and testifies to a full disclosure, he is recommended to mercy, and a pardon is always granted. Here the Attorney General, of his own authority and upon his official responsibility, gives the pledge of the Government that the State's witness shall not be prosecuted, if he makes and testifies to a full disclosure of all matters in his knowledge against his accomplices. In England, as well as in Massachusetts, those who are admitted as witnesses for the Government, may rest assured of their lives if they perform their engagements. So that it becomes a material inquiry how those persons in England, who have been admitted as witnesses for the crown, are dealt with, if they fail to redeem the pledge which they made to the government upon receiving the benefit of becoming King's witnesses.

And we believe the law to be clearly settled there, that if they refuse to testify, or testify falsely, they are to be tried themselves, and may be convicted upon their own confession which was made after they were so permitted to become witnesses for the Crown.

This rule of the law is recognized in the books. In 2 Stark. Ev. 23, and 50, it is stated that where a prisoner had been admitted king's evidence, and confessed, and upon the trial of his accomplices refused to give evidence, he was convicted upon his own confession, although it had been previously falsely represented to him by a constable that his accomplices were in custody. And that conviction was approved by all the judges in England. *Rex v. Burley*, coram Baron Garrow, at Lent assizes, 1818. So in 4 Bl. Comm. 333, in a note by Mr. Christian, published more than twenty years ago, it is said, that upon a trial some years ago at

York, before Mr. Justice Buller, the accomplice who was admitted a witness, denied in his evidence all that he had before confessed; upon which the prisoner was acquitted. But the judge ordered an indictment upon his previous confession and other circumstances; he was convicted and executed." And it is added, "if the jury were satisfied with his guilt, there can be no question in regard to the law or the justice of the case." This note is continued in the late edition of Blackstone's Commentaries by Chitty and Archbold.

The permission to become a witness for the Crown was introduced as a substitute for the old law relating to approvement; and is a great melioration of the law in favor of those who are admitted to be king's witnesses. See *Rex v. Rudd*, Cowp. 335, and the cases there cited by Lord Mansfield. According to the law of approvement, if the jury do not give credit to the approver, and his accomplices are acquitted, the approver himself is executed; but where the king's witness makes a fair and full discovery to the satisfaction of the judge, he is to be recommended to mercy, notwithstanding the Jury would not convict the accomplices upon his evidence.

The law touching approvement has not been adopted in Massachusetts, but instead of that the law and the usage have been, to admit persons as witnesses for the State; and they are to be treated here in regard to their confessions, as witnesses for the crown are in the mother country. The prisoner who does not conduct himself truly, is not at liberty to take back the confession which he deliberately made. It is clear that the king's witnesses could not do so in England, and we do not perceive any legal reason why the State's witnesses should be permitted to do so here. A confession made under such circumstances as are found in this case, must be considered as freely and voluntarily made.

The case of Hall has been cited by the counsel for the prisoner, to show that confessions made under the hope of being admitted king's evidence, are not to be received.

That case is cited in a note to Lambe's case (case 236), 2 Leach 636. It is stated in the note, that one Tart was offered to prove that the prisoner, Hall, desired him to apply to the justice to be admitted as witness for the crown, for that he had not entered the house but had only stood at the door while the other two prisoners went upstairs to commit the felony. And that Mr. Sergeant Adair, who sat on the crown side for Mr. Justice Wilson, on objection being made, rejected the evidence as not a voluntary confession, but made under the hope of being admitted to become a witness for the crown.

This case is mentioned in 2 Stark. Ev. 49, but not with approbation. It is against the current of the authorities; going to the extent of rejecting confessions made without any external influence, merely because the party hoped to obtain some benefit thereby. Such a rule would exclude all confessions; for although they may arise from the party's own reflection, they are always made under a hope of some benefit. But in that case the external influence is entirely

wanting. It appears also, in the principal case above cited (Lambe's case), that Hall was convicted upon his examination before the magistrate, which was not taken in writing, but proved by two witnesses *viva voce*, which amounted to a full confession of his guilt. But we do not perceive any good reason for the rejection of Tart's evidence, as to the confession which Hall made to him of his own accord, as is above stated.

Upon the whole, after great consideration, we are all of opinion that the confession of the prisoner reduced to writing and signed by him, and made under the circumstances which are proved in this case, is competent evidence for the consideration of the Jury.

The *Attorney General* then read the confessions of the prisoner.

FIRST CONFESSION.

Salem Jail, 29th May, 1830.

I mentioned to my brother, John Francis Knapp, in February last, that I would not begrudge one thousand dollars that the old gentleman, meaning Capt. Joseph White of Salem, was dead. He asked me why. I mentioned to him that the old gentleman had a will, which if destroyed, half of the property would come on this side; that is, to my mother-in-law, Mrs. Beckford; that with the present will, the bulk of the property would go to Stephen White; that he had injured me in the opinion of the old gentleman, and I had no doubt had also prejudiced him against all the family, and that I thought it right to get the property if I could. I mentioned to him also in a joking way, that the old gentleman had often said he wished he could go off like a flash. We then contrived how it could be done. One way was to meet him on the road, but the old gentleman was never out at night. . . . Another was to attack him in the house, but Frank said he had not the pluck to do it, but he knew who would. I asked him who, and he said he would see George and Dick Crowninshield. I told him, well, I did not think they would, but he could go and see. He got a chaise with Wm. H. Allen and went to their house, as he said, and proposed it to both of them. George declined going into the house; that is, Captain White's house. But he said, as Frank reported, that he would meet him anywhere outdoors, but would not go into the house. Dick said he would do it, if George would back him. George would not, but Dick appointed a night to meet Frank. They met two or three different times. Once at the Universalist Meeting House, as my brother said; once in South Salem, by the South Field Bridge, as I understood my brother; and once at the Salem Theater—at the building; there was no play that night. At their meetings my brother, Francis Knapp, told him just what I had said. There was another meeting appointed at Salem Common for the 2nd of April. I went on the Common that same evening, and met Richard Crowninshield at 8 o'clock in the very center of the common. I told Richard Crowninshield how matters stood, and that I had taken the

will of Captain White either that day or the day before. I took the will out of his iron chest; it had the key in it; I turned the key and took it out—I told him what I would give him, that it should be just as my brother had represented, meaning that I would give him a thousand dollars if he would fix him, meaning Captain White. Richard Crowninshield then showed me the tools he would do it with, which were a club and a dirk. The club was about two feet long, turned of hard wood, loaded at the end, and very heavy. I presumed it was loaded, and ornamented at the handle; that is, turned with beads at the end to keep it from slipping—I took hold of it; I think I lifted it. The dirk was about five inches long on the blade, having a white handle, as I think—it was flat, sharp at both edges, and tapering to a point. I do not know where he got the dagger, but he said he turned the club himself; I asked him if he were going that night, and told him what time the old gentleman went to bed generally, which was about ten or a little before—he said no, he could not do it that night, that he must wait a little—he did not feel like it because he was alone, and his brother would not back him—but he said he would meet my brother another time—I do not know what evening. It had got past nine, and I left and went home to Wenham. I kept the will one or two days in my chaise box, wrapped up in hay. It remained there until I heard of the murder, and then I burnt it. I came down on Sunday and attended meeting. My brother said he saw Richard Crowninshield that evening at the bottom of the common. The old gentleman (meaning Captain White) went to Mrs. Stone's to tea that evening. My brother told Richard Crowninshield that Captain White was up there, who said he would catch him there, if he, that is, Captain White, did not come home before dark. He did come home before dark, and they were disappointed. He expected to meet him in Chestnut street, and my brother mentioned that Richard Crowninshield said he would dirk him in Chestnut street if he met him. I went home Sunday night about dark. My brother came to the farm at Wenham, on the next Tuesday afternoon; I told him that my mother Beckford was at the farm, and was to pass the night; she had come up because Mrs. Davis wanted her assistance. I mentioned this to my brother, and told him he had better tell this to Richard Crowninshield. On the Friday preceding, I unbarred and unscrewed the window of Captain White's house, closing the shutter again. My brother said he would inform Richard Crowninshield; my brother left the farm about tea time, with the chaise in which he came up; my brother made this remark as he went off: I guess he will go tonight.

The next morning, Wednesday, 7th of April, Mr. Stephen White's man came up in his chaise, and informed us that the old gentleman White was dead, and mother Beckford said she would go right down with him. My brother Frank came up to the farm that day about noon—he asked if we had heard the news; we told him yes, and how we heard it. After dinner he told me aside how it occurred. He said Richard Crowninshield met him, I think in Brown street,

in Salem, about 10 o'clock in the evening, and that he, Richard, left him and came round through the front yard, passed through the garden gate, pushed up the back window and got in by it; and passed through the entry, by the front stairs into Captain White's chamber; that he struck Captain White with the club above named, while asleep, and after striking him he used the dirk, and hit him several times with the dirk, and covered him up, and came off, and met my brother again in Brown street or by the common, I think about 11 o'clock. He says Dick told him before he went in, if he saw any money there he meant to take it. When he came out, my brother asked him if he had got it—he told him no, but he had fixed him. They separated and went home. This is all I know of the affair until I saw my brother again after he had seen Richard Crowninshield again. I came down to Salem on the afternoon of the 7th of April, and stayed in Salem a fortnight; my brother informed me that he had seen Richard Crowninshield once or twice and that Richard Crowninshield having seen the accounts of the number of stabs in the newspapers, said that he had stabbed him but four times, and Richard Crowninshield remarked that he really believed there had been another person into the chamber, because he did not recollect making more than four or five stabs at the farthest.

A fortnight or three weeks after the murder Richard Crowninshield rode up with my brother Frank to the farm in Wenham; he stayed there a little while, and I gave him one hundred five-franc pieces, which a few days before I had received from Guadaloupe, by Captain Josiah Dewing. While Richard Crowninshield was at the farm, he told me the same story which my brother had done, and said he had done the deed. He remarked that he was pretty short, and should want some more money soon. He mentioned that it was a great pity we had not got the right will, because he said if he had known it had been in there, he would have had it himself that night. Richard Crowninshield informed me that same evening, that he had put the club with which he killed Captain White under the Branch Meeting House steps; my brother went to look for it since, but could not find it. I suppose he did not look in the right place.

I wrote a letter dated, I think, the 12th of May, addressed to the Hon. Stephen White, at the house in Wenham, on Sunday morning, the 16th of May, signed either Grant or Claxton, and another addressed to the Hon. Gideon Barstow, signed either Grant or Claxton—I cannot tell which was which—which letters I brought to Salem, and gave them to Wm. H. Allen, who said he would put them in the post office that evening. The purport of the letter addressed to the committee was, that I, the person signing the letter, went into the chamber and struck old Mr. White on the head with a piece of lead, and that I pierced him or stabbed him three or four times with a dirk, and that Stephen White gave the finishing stroke; that he offered me five thousand dollars, and had not sent any part of it.

One of the letters was dated Lynn, I do not know which. The

purport of the letter to Mr. White was that he must send me the five thousand dollars or suffer the consequences—I believe that was the amount of it—there were very few words. These letters, I think, were put into the office in the evening. William H. Allen was at our house two or three days afterwards, and told me that he had put them in. I do not think he knew the purport of them. I told him that I had received an anonymous letter and that this would brush off the effects of it.

I know nothing of Chase or Selman in this business. I know nothing of Palmer or Carr, nor ever heard anything, until I came into the Salem Jail.

I, Joseph Jenkins Knapp, Jr., now in Salem Jail, on this 29th day of May, being Saturday, have given the foregoing confession relating to the murder of Joseph White of Salem, to Henry Colman, minister of said Salem. It contains the truth, and nothing but the truth. It is given without compulsion, solicitation or bribe—and with no other promise from the said Colman or any other person, than that of the Attorney General shown me by said Colman, promising to the individual who should make a full confession of the facts in the case, that he should be made a witness, and being made a witness, the Government pledge to him that he shall not be prosecuted for the offense. I declare solemnly that no other proposition has been made by said Colman; and that I have engaged to him, to answer any other questions touching this subject, which may be addressed to me by competent authority as far as my knowledge extends. In witness whereof I have hereunto affixed my proper name, and have also affixed it to every page of this confession, being nine times in the whole.

(Signed) JOSEPH J. KNAPP, JR.

The Attorney General read the letters addressed to the Committee of Vigilance, and to the Hon. Stephen White, which were proved at the former trials to have been sent to the post office by the prisoner at the bar. These letters were identified by Dr. Barstow, chairman of the Committee of Vigilance, and by Joseph Grant, Jr., clerk in the post office.

Mr. Webster stated that there was a subsequent confession, made by the prisoner on Monday afternoon, 31st May. It was in reply to questions addressed to him by Dr. Barstow and Mr. Phillips, of the Committee of Vigilance. *Mr. Webster* read the statement, which was as follows:

SECOND CONFESSION.

Salem Jail, Monday afternoon, 31st May, 1830.

I, Joseph J. Knapp, Jr., do declare, in presence of Gideon Barstow and Stephen C. Phillips, as follows:

Some time in January, on one day in the afternoon, I went into Captain White's chamber, found the iron chest locked with key in it; and unlocked it. It contained some silver plate and a paper wrapper sealed—cut the wafer with a penknife and found that it contained a will—read it. It contained a legacy to Mrs. Beckford of \$16,000. The witnesses to the will were Joseph Lambert, Thomas Downing and Joseph G. Waters. Don't recollect particularly the other provisions—suppose that it was written by Joseph G. Waters, as he told me on the day on which Captain White's will was read to the heirs, after his death, that he had made two wills for him. After I had examined the will I sealed it again, and put it back in the trunk—knew that the old gentleman when he was taken sick two years ago, had stated that his will would be found in the iron chest. At this time I think my brother was not at home.

Some time, say a fortnight, afterwards, I bought a quantity of prussic acid, some aqua fortis, and also some unguentum; my brother-in-law, Beckford, said it was good to kill canker worms. I bought it for this purpose—being winter time, made no use of it at that time, and have not since used it for any improper purpose—Joseph Beckford, I suppose, has it now.

I have understood from Richard Crowninshield that he had no light when he entered the house; he told me that he found the plank by the gate of the garden, and himself put it against the window. I myself think there was not any blood upon the doors, as has been supposed, nothing occurred to hasten his departure from the house—he did not open the iron chest—he said he did not touch anything—said he was not in the house more than ten minutes—he left the house about half past ten. There was no wagon employed that I ever heard of. R. Crowninshield said he walked home; he told me that he was in the house alone; that he made the wounds himself; and that if there were more than four or five some other person must have inflicted part of them. He told me he melted up the dirk the next morning at his factory—he said he did not get any blood at all on his clothes. I think he had no distinct idea of the number of stabs—he said Captain White never moved—he said he felt his pulse, and found that it had ceased to beat. He carried the dirk in his bosom, and the club up his sleeve—these were his only weapons.

I don't think my brother was ever at the gambling house in South Salem—I never was there.

My brother (Frank) slept at home on the night of the murder.

On the day on which I opened the window, I took the key out of the chamber door, and tucked it under the covering (near the edge) of the sofa.

The Wenham robbery was a mere hoax. I do not know what passed between my brother Frank and the Crowninshields on the 2nd of April, when Frank and Allen rode up there on horseback.

I hardly expected the murder would be perpetrated; thought they would not dare to undertake it.

I have understood that my brother first proposed the murder to

George Crowninshield—George said he would not mind meeting him (the old man) on the road, or in the street; but he wouldn't attack him in the house.

I had only one interview with Richard Crowninshield before the murder; that was on the common, as before stated. I went there with my brother at 8 o'clock. In the early part of that evening I went with my brother to ride on horseback—rode beyond the Sign of the Eagle—past Wheeler's; and returned without stopping—got back about 8 o'clock. I told my brother that I would go down with him. When we got there, R. Crowninshield was not there—we waited half an hour—he then came alone from the head of the common. He said he didn't feel exactly like it that night, that his brother would not back him, and he didn't then feel like going alone.

I was in Salem on Sunday, but not again until after the murder. I never had but one interview with Richard Crowninshield after the murder; it was in the evening; he came into the house; into the front room; he came with my brother; don't know where he found him; he stopped about half an hour.

Joseph Beckford and Davis know nothing at all of this affair.

It was a Sunday evening, that it was designed to attack Captain White in Chestnut street—a Sunday evening, 4th April. I knew he was going, and mentioned it to my brother, who told R. Crowninshield.

I have received communications in paper through the ceiling, from both George and Richard Crowninshield. R. C. has written to me to inquire whether I thought Palmer's testimony would be taken—I answered that I thought it would be. He replied that he guessed not. They both mentioned that they thought it would not be taken, and that it would go hard with them if it should be taken. They inquired what was going on outdoors; what the crowd was looking at, etc. George Crowninshield said he had Palmer locked up in his room about a week (that he had been passing counterfeit money, etc.)—it was about the time this business was going on.

My brother Frank told me two or three times that I had better let the business alone; that I was looking altogether on the bright side, and did not consider the danger I was running. I told him I had weighed the matter pretty well, as I thought, and that I would run the risk of it.

In testimony of the truth of the foregoing statement, I have hereunto subscribed my name, having signed it also at the foot of every page.

JOS. J. KNAPP, JR.

The letters of the prisoner before referred to were then read,¹¹ when *Mr. Webster* stated that the evidence for the Government was closed.

¹¹ See *ante*, p. 437.

Mr. Gardiner said that the evidence introduced by the admission of the confession was altogether unforeseen and unexpected—the nature of these confessions was not before known to the prisoner's counsel—and they were not prepared to open the defense without some time for consultation.

The COURT thought there could be no surprise—their client must have known that he had made such confessions—and the fact that confessions had been made was sufficiently notorious. The Court had no time to spare, and must decline granting any delay.

MR. GARDINER, FOR THE DEFENSE.

Mr. Gardiner stated to the jury the nature of the indictment, and what it was incumbent upon the Government to prove. He contended that the first question to be determined was whether John F. Knapp did actually perpetrate, or aid in the perpetration of the murder—if it was manifest Captain White was not actually murdered, then the defendant could not be guilty as an accessory, so if it should prove that J. F. Knapp did not actually aid and abet in the murder, the defendant could not be found guilty. The law is, that the principal must first be convicted before an accessory can be convicted. He considered the mere record of conviction not sufficient. We shall undertake to satisfy you, gentlemen, notwithstanding the record of conviction, that John Francis Knapp was *not* a principal in the murder of Captain White. You come here, gentlemen, to ascertain the truth. Shadows, clouds and darkness yet rest upon this whole transaction—the greatest uncertainty exists as to the circumstances attending the matter. We shall endeavor to show in the first place, that J. F. Knapp neither murdered Captain White or aided the perpetrator of the murder. But, it may be asked, how can this be? Has not the verdict of a jury condemned him, and has not the judgment of the Court been passed upon him? True—but that is not conclusive in regard to the prisoner now upon his trial. He has a right to go into the inquire whether that jury came to a right conclusion. You are aware that one jury was unable to agree—another did agree—but the propriety of their verdict was then doubted, and has since been doubted everywhere—in all parts of the

Commonwealth—and the evidence before the public is the same as before that jury.

If any doubts now remain, those doubts should operate in favor of the prisoner. All of you know the extraordinary circumstances attending the murder—the means adopted to detect and prosecute the supposed murderers—the excitement which has continued to the present time, etc. Every man was left to his own suspicions, to his own conclusions as to the perpetrator. The trial came on in the midst of this—days were employed by the counsel for the Government in pouring in heaps of circumstantial evidence. Under these circumstances of excitement, when men came to the trial with their minds made up, a verdict was obtained against John F. Knapp.

Yes, gentlemen, it was found that R. Crowninshield, the supposed real perpetrator, could not be tried, and the inquiry was, what can be done? Someone must be found to convict as principal, and John Francis Knapp, who had been considered the mere conduit of communication between the supposed author and perpetrator of the murder, was brought to trial. Ordinary and extraordinary means were used to convict him—even legislative interference was resorted to—large rewards had been offered, and great motives held out to furnish evidence. We have referred to the employment of Mr. Webster—that gentleman had said that it would better become us to answer his arguments than to find fault with his taking part in the trial. But the gentleman must be aware that he can answer our arguments, but we have no opportunity to answer his, as he closes the argument. Our objections to Mr. Webster appearing in these cases is grounded on principle—they surely are not personal. We consider it illegal for counsel to appear in aid of the law officers of the Government, in behalf of a private prosecutor. This fact is denied in regard to the present case, but it was expressly admitted at the former trial. It delights me to see that gentleman represent the Commonwealth in the Senate Chamber of the United States; it would delight me to see

him represent the Government here—but it does not delight me to see him representing a private prosecutor in the name of the Commonwealth. The prodigious power of this gentleman was exercised against the unhappy youth then put upon this trial. The Government was aided by his great powers in closing the cause—yet, notwithstanding this great pressure of opinion and power brought to act against the prisoner, the first jury could not find the defendant guilty of the matter charged against him, and they were discharged by the Court. Anciently, no man could be twice jeopardized for the same offense—a jury having once acted upon his case and been discharged, without an agreement, it was considered equivalent to an acquittal. The law is now settled otherwise—a man may now be a second time tried. J. F. Knapp was again put upon trial, before another jury, with an accumulated force of circumstances against him. It was not at all extraordinary, and by no means discreditable to that jury, if under these circumstances they drew an erroneous conclusion. If it can so be shown, then no principal has been convicted, and the prisoner at the bar cannot be convicted. With regard to the meaning of presence, aiding in a murder, if the evidence is conclusive that no other fact was proved against J. Francis Knapp than that he was present in Brown street—then it is for you to inquire whether he was there present with an intent and power to render aid—if not present with such power and intent, then the verdict against him so far as it affects the prisoner at the bar, is a nullity. I venture to say, that no two of that Jury could agree as to the sort of aid which F. Knapp could have rendered in the situation he was described to be in.

In conclusion, he referred to the confession which had been introduced; he said that he had never seen it, or before heard it read; he was therefore not prepared to consider the effect of that confession upon the guilt of J. F. Knapp. He stated the circumstances under which that confession was made, and read some authorities upon the subject of confessions, to show that under certain circumstances they were the worst evidence, etc.

Mr. Gardiner proposed to call witnesses to show the situation in which John F. Knapp was seen in Brown street.

Mr. Webster called the attention of the Court as to the extent to which an inquiry respecting the legal conviction of J. F. Knapp might be carried. He thought it manifestly improper to go into the whole inquiry of the guilt or innocence of that individual. He thought the defendant ought to prove some *new fact*—to show that Knapp was manifestly innocent—he was aware the limitation was a difficult question—but it would be a great inconvenience to retry that cause entirely, and he thought it not right to do so. He could find no authority for such a course. If any new facts were to be offered to show the innocence of the person convicted, he should not raise his voice against it.

The COURT. We are aware of the difficulty—and are unable to apply any limitation. The fact is established by the record that J. F. Knapp was convicted as principal—but that evidence may be removed by showing that he could not have taken a part as principal. The defendant must take the burden of proof; he must show clearly to the jury that the verdict was wrong.

Mr. Gardiner exhibited to the jury a plan of the premises of Captain White and neighborhood, and called *J. A. Southwick*. *Mr. Webster* thought it strange that the same evidence offered to prove Knapp guilty should now be produced to prove him innocent. *Mr. Southwick* and *Captain Bray* were then examined by *Gardiner* and cross-examined by *Webster*, and stated same facts as on former trials. *Mr. Gardiner* stated that these were the only witnesses who saw Knapp in Brown street, and should he stop here.

Mr. Webster then called *Captain N. Kinsman*, *Philip Chase*,

Stephen Myrick and *Peter E. Webster*, who testified as to view of Captain White's house from Brown street, and persons seen there on night of murder, as before—and *Rev. Mr. Colman*, who testified to finding the club, etc.

Mr. Dexter. Have you related all the conversation which took place previous to Joe's written confessions?

Mr. Colman. I believe I have. Did F. Knapp state where the club was, in answer to a particular question? He did. He did not state to me how he knew it was there.

MR. DEXTER, FOR THE DEFENSE.

Mr. Dexter was satisfied the cause was brought down to two or three narrow points. He entered upon this defense with very different feelings from those which he entertained on the former occasion. He was satisfied that the Jury was impartial and merciful, having no desire to take the blood of the prisoner, and that if they could save his life, which he thought very possible, they would do it. The first inquiry

is, whether John F. Knapp was a principal—if the Jury are satisfied that he was wrongfully convicted of that charge, then they are bound by their oath, to acquit the prisoner at the bar. There is, however, another question preliminary in its nature. If F. Knapp was guilty, it does not necessarily follow that the prisoner is necessarily guilty as an accessory. Government must prove that the prisoner hired and procured John F. Knapp to commit the act—if the jury have any doubt, then they must acquit the defendant. The only evidence against the prisoner is the testimony of Leighton, and the confession. (He commented upon Leighton's testimony at great length, and with remarkable closeness and severity—he endeavored to show, as at the former trials, that it was entirely incredible and worthless, and not to be considered as weighing a feather in the case.) Then as to the confession, the Jury were to inquire whether that was credible. This was the sole reliance of the Government; if incredible, or such evidence as ought not to be received, then the prisoner is entitled to an immediate acquittal. The question of the admissibility of this testimony, was to be determined by the jury. It was a question of law more proper for a jury to consider than almost any other question that could come before them. *Mr. Dexter* contended that the hope of favor under which the confessions were made to Mr. Colman influenced the prisoner in all the subsequent confessions, and that of course they were such confessions as the law excluded from being received as testimony. He held it to be undisputed law, that after a confession is once produced, under such influences as not to be entirely voluntary, no subsequent confession can be used, unless the conviction should have been entirely removed, at the time of making it, that the person is to be benefited. *Mr. Dexter* proceeded to consider whether a confession made under the circumstances of that now produced could be properly admitted in evidence. It was a question for the jury to decide. If they believe it was made under inducements held out by the reverend witness, they would reject it. *Mr. Dexter* expressed his dissent from the grounds on which the confession was allowed by the Court

to go before the jury. He thought, with great deference, that those grounds were not supported, and again went over the circumstances of the confession. After a close and powerful argument on this point, he came to the conclusion that this evidence was entirely incredible—that if there was a doubt whether it ought to have gone to the jury, or if the jury disbelieved it, they were bound to reject it—and that if they rejected it, he could not see where they could possibly light on evidence to find the defendant guilty.

There was one fact at least in the confession which was probably not true. Joseph states that his brother Frank went to find the club and could not. Mr. Colman testified that Frank told him the particular spot. This was certainly a contradiction. The only way to reconcile this was to suppose that Frank was told afterwards by some other person where the club was. It will be recollected that this was one strong piece of the evidence on which Frank was convicted. The confession now shows he did not know where the club was hid.

Mr. Dexter said he hoped to show a proper deference to the Court—but he deemed it his duty to argue to the jury a question of law even in opposition to the opinion of the Court. He claimed the right to deny that John Francis Knapp was a principal in the murder, and proceeded to state in evidence given at his trial, the nature of it, etc. He said there was no evidence to show he actually gave the blow, and that he would undertake to deny he was present, aiding and abetting. He would now admit Frank was in Brown street—the confession makes that point stronger than before. Then comes the question of fact, whether, being in Brown street, he was present aiding and abetting. He stated the rule of law laid down at the trial of J. F. Knapp—if the jury were satisfied that the man seen in Brown street was not there for the purpose of aiding and abetting, and could not there afford aid, according to the rule of law, then they were bound to acquit defendant. If he was not so present, then he ought not to have been convicted, and you cannot convict the prisoner. If you are satisfied he hired and procured Richard Crowninshield to commit the murder, then you are not to

convict him, because he is not so charged, and because Richard Crowninshield has not been convicted as a principal. You can convict him only as an accessory to Frank Knapp. *Mr. Dexter* then endeavored to show that the person in Brown street could not afford aid—that the house of Captain White could not be seen from any place where that person was seen by the witness—was a person unarmed, sitting on the Rope-Walk steps, or standing at the posts described, there for the purpose of helping Richard Crowninshield kill Captain White—for that is the conclusion the jury must come to, to convict the prisoner. If J. F. Knapp was there, what was he to do? Was he in the right place to afford aid? If his object was to aid, why did he not go into Essex street, or to the garden of Captain White or some other place where aid *could* be rendered? Why did he go to Brown street, where he could not have known if R. Crowninshield had been seized while in the act of committing the murder and carried off to prison? He might have done a hundred other things, if his object was to afford aid, more likely to effect that object, than waiting in Brown street. There were great improbabilities, if not impossibilities, in the supposition, which nothing but prejudice and passion could have got over. Nothing but an excited imagination could have induced that Jury to have got over the difficulty that Frank Knapp was in Brown street, aiding and abetting. You would almost laugh at a proposition to go there in aid of what was doing in a house situated as Captain White's was. It will be said you do not know all the modes in which aid might have been rendered. But as acute a mind as exists amongst us has been twice exercised in conjecturing these modes, and we have the results. But all the hypotheses are most improbable, and unworthy of belief. Richard Crowninshield wanted no information as to the best time to do a bloody deed—he could see and hear as well as a man in Brown street. As to helping his escape; how a man on foot could help another man on foot to run away is difficult to explain. If Frank had had a horse in Brown street, then I would not say a word. "He might be there to see if the street was clear." But the mur-

derer came out into Essex street and went round into Newbury street—where was the danger? In Brown street? Certainly not. Why did he not have somebody in Newbury street, or at the corner of Newbury and Brown streets, where he could have had a much better opportunity to watch the approach of danger? But he was seen watching nowhere—there was nothing in his conduct that appeared like keeping watch. The whole evidence is the other way. “To conceal weapons or clothes.” This is equally improbable—and finally, “Ready for any unseen contingency.” No man could have made every possible suggestion with more facility than the eloquent and learned gentleman on the other side—and these are all he could produce—affording not the least presumption of guilt in the prisoner. Really this is *presuming* away a man’s life for want of proofs. But what was he there for? There are infinitely stronger presumptions that he was in Brown street for other purposes than that of aiding and abetting—there is evidence that he was a conspirator in the murder—he knew he was perilling his own life. It may be supposed that Frank Knapp had a curiosity to know what happened when R. Crowninshield went to commit the murder, because it morally concerned him to know—if the perpetrator was taken it would become him immediately to make his escape—this is a sufficient reason for his being there—where he could learn the event, and take measures for his own security.

There was another fact, not before the former Jury—the fact stated in the confession respecting the money expected to be found in Captain White’s chamber. Could not this have been a motive, to receive a share of the plunder? If there for either motive, it does not make him a principal. He asked the jury if he had not given the most probable reasons for F. Knapp’s being in Brown street. Another piece of evidence comes from the man who is said to be the contriver of the whole plot—we have from him the particulars of the whole transaction, from beginning to end, and there is nothing to show that Frank Knapp was a principal; the whole tenor of them shows the fact to be different—that he was a mere go-

between from Joe to Richard Crowninshield. (*Mr. Dexter* here quoted several passages of the confession, to show the part Frank took. When he read the sentence, "I guess he will go tonight," he presumed he meant that R. Crowninshield would go that night to commit the murder—*Mr. Webster* said he believed he meant that "Captain White will go to another world tonight.") *Mr. Dexter* also quoted from the confession—"My brother told me two or three times I had better let the business alone." Is that the language a man would hold who intended to perpetrate, or aid in perpetrating a murder? He spoke merely as one concerned, not for himself, but his brother. The whole tenor of the confession is uniform, that John Francis Knapp was not a principal.

I have now gone through with the grounds of the defense. If you are satisfied that the testimony of Leighton is improbable and not to be regarded; that the confession ought not to be admitted as evidence; that John Francis Knapp was not in Brown street for the purpose of giving aid in the murder—you are to say the defendant at the bar is not guilty.

November 12.

The court room was crowded to excess with spectators, and the gallery was filled with ladies, who came to hear the closing argument of *Mr. Webster*, for the Government.

MR. WEBSTER, FOR THE COMMONWEALTH.

Mr. Webster. May it please Your Honors—Gentlemen of the jury: The unhappy man who stands charged as being the original mover and promoter of the murder of Captain White, is now before you—it is your duty to pass upon his life. His own brother, allured by him into this dreadful crime, has already atoned by an ignominious death the violated laws of his country. Another young man, so depraved and reckless of human and divine law, as to receive at the hand of the contriver of the murder, the price of blood, has gone to another world, leaving behind him a most fearful example of guilt and self-condemnation. The prisoner at the bar, who has caused all this dreadful mischief—who is the

author, I may say, of *three* deaths—comes before you for his trial—you are the selected judges of his fate—the law knows no man so guilty as not to be heard before a jury—and it knows no man too high or too low to be beyond its reach. Ten of you, gentlemen, were selected from the whole panel drawn for these trials, as having come here unbiased for or against the prisoner, objections having been made by him to all the rest—and two of you were chosen from the bystanders after a large number had been called. Every capital trial is so important that a strict scrutiny in the selection of Jurors is proper—the great object of all trials is to secure an impartial tribunal. If a Juror is not impartial, justice will not be done to the prisoner or the Government. Impartiality of course respects both sides of the question. Everyone of you has sworn that you came here without bias. I am sure you do so come because you have sworn it; you have sworn to try the question of the guilt or innocence of this prisoner. If he is not guilty you will say so, if he is guilty you will say so. You will look to no consequences as to what will follow. No man on this Jury can hold an opinion that no capital punishment can be inflicted in any case, for no man holding this opinion could come upon this jury without perjuring himself.

On an occasion of so much importance to the prisoner, to the Commonwealth, and to you, I feel an entire reluctance to say anything about myself. I came here at the invitation of the Attorney General to perform some part in exposing to light this dark transaction. A gentleman so feeble in health as my venerable friend might well be supposed to require some assistance in so arduous a duty as his. You are to judge whether I come here under any improper influence. But I pass from this subject, because you have so much more important subjects of consideration, that anything said by me or by others who say things much better than I can, respecting so feeble an individual as myself, will not attract your very deep regard.

Gentlemen, whether viewed as an act of courtesy or an act of justice, it is but fair to say that everything has been

done by the unfortunate defendant to convict himself. He has left no ground for his Counsel to stand upon; they have done everything for him, he everything to thwart them.

It is proper to say that he stands before you to be tried on the evidence, or rather on his own confession of everything material to the case. Let us see whether everything which he confesses is not true. (He here recapitulated the circumstances of the murder and the facts since disclosed, to show the exact agreement of every part of the confession, with the facts proved by other evidence.)

John Francis Knapp has been convicted as a principal in this murder; Joseph J. Knapp, Jr., is indicted as an accessory. Though speaking of him as a mere accessory, for he is so in point of law, you are to consider his crime as great in law, and in consideration of religion and morals unspeakably greater, than that of the principal. But, however great his crime, however enormous his moral guilt, it is true he cannot be convicted until it is proved a principal has been convicted. Therefore the first step to be taken was to produce the record of the conviction of John Francis Knapp as principal. Let me remark that by being principal it is not meant, that he actually struck the blow, etc. (He here explained the law.) The indictment against F. Knapp charged him in various ways as principal, to meet the case. He was tried, a jury found a general verdict of guilty—of course, he was found guilty on every count in the indictment charging him as principal either in the first or second degree. The great question is this: We having produced evidence of the conviction of the principal, what is the legal effect of that conviction upon the prisoner at the bar? Beyond all question you are judges of the law as well as the fact; in general you are so, but not to the extent contended for by the other side. But you will, as good citizens, with the eye of the public and the eye from above upon you, give full consideration to the judgment and direction of the Court on points of law. I take the law to be this, the record of the conviction of J. F. Knapp is to be considered *prima facie* evidence until overthrown. The learned Counsel goes too

far when he contends that this is an entirely open question. It is to all common purposes a settled question. It affords sufficient presumption for you to go upon until shown by plain and manifest evidence that Francis Knapp was not guilty. Some manifest mistake in the conviction must be shown, or the record must stand, and the burden of proof rests upon the defendant. You must see reason to attain that Jury; you must be convinced that they did manifest wrong, or you cannot alter a letter of their verdict. You will not be hasty in saying that jury sent John F. Knapp to his grave unjustly. That is the point the defendant is to prove clearly—a doubt is not sufficient. Shadows, clouds and darkness cast upon it, so much mist cast over it that you cannot see it was right, will not avail; but there must be so much light through the clouds that you must see it to be wrong, or the record cannot be touched by you. Gentlemen, supposing, as I do not admit, that the defendant has a right to open the question anew as to the guilt or innocence of J. F. Knapp, nothing is now proved favorable to him which was not proved before, and everything is proved against him which was proved before. It is a most gratifying circumstance, and peculiarly gratifying to my own feelings, that after all we have heard of pouring in heaps of circumstantial stuff, after all the complaints about the means used to convict J. F. Knapp, after all the imputations we have heard, that we were not mistaken in any one circumstance—everything has come out by the confession exactly as we believed. The case is now as clear as the light of heaven—we all have the satisfaction of knowing that Frank Knapp was convicted under no mistake of the least particle of fact. The gentleman on the other side says the correctness of the verdict has been doubted everywhere, but I did not before know this. The only astonishment I have heard expressed was, how learned and intelligent men could doubt, or affect to doubt, as to the propriety of that conviction. We took a great deal of pains to prove, against the strenuous efforts of the gentleman, that Frank Knapp was in Brown street. He now admits he was there, and proves it also, but argues that he

could not be there to take part in this murder. Let us see upon what the learned Counsel rely to support their argument. They must show clearly and manifestly that during the time of the murder he was in a place where he could not aid or abet the principal, or it comes to nothing. (He went into an extended argument on this point, and went on to show that all the facts, arguments and points of law now relied upon by the defendant's Counsel to prove F. K. was not a principal, were before the Jury which tried him, and they decided against him. Therefore, the matter is at rest. The present jury cannot unfind the verdict found by the former jury. In reply to that part of Mr. Dexter's remarks in which he referred to his former suppositions as to the purpose of Frank's being in Brown street, he endeavored again to show the reasonableness of those suppositions, and suggested various other ways in which he might have assisted or encouraged the heart of the murderer.)

There is one consideration of vast consequence in regard to the encouragement of a murderer to execute his bloody design. He does not enjoy the gratification of guilt without some one to participate with him. There is an irresistible tendency in his mind to impart his crime, to tell of his guilt. His heart is encouraged and his hand strengthened by knowing that there is some banded friend, while he is executing the deed of blood, within a few minutes' walk, in whom he can confide and entrust his secret. So strong was this feeling in Richard Crowninshield, who has shown a courage, nerve, and boldness of heart that would have been the admiration of mankind had they taken a right direction, that even he, as appears by the confession now before you, in the flash language there used, must have a backer before he could accomplish his engagement. He did not feel like going alone to kill that old man. His brother would not back him—he wished to have some one to encourage his heart, and the man who acted this part was just as much a perpetrator of the murder as if he gave the blow. This encouragement the law considers effectual aid. If Frank Knapp supposed at the time that he was not affording such aid as in law would

amount to the crime for which he suffered, that is nothing to the purpose. He was to be judged by his acts; he was bound to know what the law was, and if what he did amounted to a particular crime, he was to be considered guilty of that crime. The testimony of Bray and Southwick is now verified by the confession; it is now admitted to be true, and these witnesses are called on by the defendant's Counsel to state the same things which they stated against the former defendant. Myrick's testimony is likewise supported by the confession. Another very important fact is also brought to light by the confession. It now seems that a part of the felony was to steal the old man's money. Frank knew this, and was waiting for his share of the spoil. This shows that his purpose was to aid in the felony. He says to Dick, "have you got the money?" His answer was, "No, but I've fixed him." It is an hypothesis set up to account for Frank's being in Brown street consistently with his innocence as a principal, that he was a conspirator, and went there to receive early intelligence of the result, and govern himself accordingly for his own security. If a conspirator, and was to have no hand in the murder, was it not for his interest to be out of the way? Mere curiosity would not induce him to go; he knew that his life was endangered. One would think that he might be content to wait till the next morning for the bloody news. Has he not gone to the grave upon the very ground of his having exposed himself by being in Brown street? Then why did he go? Was he then a coward as well as a villain, that he would do nothing to encourage or aid his accomplice? Was he a miserable wretch without spirit, as well as a miserable man without principle? No! He went to encourage the heart of the perpetrator, and he did help Capt. White to the eternal world. He went to do something—he went by appointment—he went by agreement. That agreement was the cause of the felony; and we have a right to say—the construction of the law bears us out in this—that but for his appointment, this encouragement, this presence of Frank Knapp, the man would not have gone to commit the murder, and the aged victim would for that time

at least have escaped the bludgeon and the dagger of the assassin. There are the clearest indications all along the confession that Frank was the aider and abettor. Crown-inshield would not go alone; he wanted somebody to back him; he put off the murder because his brother would not back him; he was asked by Joe, 2d April, "if he was going that night; he said he did not feel like it; he would meet my brother another time." He might have meant to meet another time to make arrangements about a backer, or another time to do the act—either very important. It was supposing Frank would do that which George would not. Again, it was intended to murder Capt. White when he was out in the evening. The confession says "My brother told R. C. that Capt. White would take tea out, and if he did not come home early, etc., it could be done. He did come home early and they were disappointed." Who did they mean? So the expression of Frank, "I guess he will go tonight." I think it means, "Capt. White will go tonight to another world." Again, "We contrived how it might be done," and "I thought they would not dare undertake it." Everything shows that F. Knapp was not a common runner, a mere go-between, as he is called. Whatsoever was done, he appears to have had a main hand in it.

Gentlemen, I have now got through with all the points of the case relating to the conviction of a principal; it only remains to show the agency of the defendant at the bar, and this brings me to his own confession. (Reads it.) This, gentlemen, is beyond all argument—there is nothing to argue, nothing to prove—there never was a case where guilt was more manifest, more acknowledged, more certain. There is no chance of any error. His confession cannot be wrong. Never was there a story more completely corroborated by external circumstances. Then there are the letters. Do they not prove guilt? This was the first act of folly (no, not the first—the Wenham robbery, so-called, now styled by himself "a hoax," was before it) which his own sense of guilt drew him into, and which led immediately to his detection. These letters, which with a most depraved heart he penned and sent to

the Post Office in order to ward off attention from himself, and fix suspicions upon the innocent, were the very means by which his own enormous guilt was first brought to light. So true it is that he who is guilty can neither stand still nor move.

Gentlemen, the confession is so full that it admits of no argument. You are not bound to pay it any uncommon deference if it stands alone. But it is entirely corroborated, and I have been struck with one thing, that in the whole course of argument of defendant's Counsel, when contending that it ought not to be admitted as evidence, they did not make the least attempt to show that it was untrue, that there was the least mistake in it. Therefore it was right in them, in their earnest desire to help the prisoner, to struggle to exclude it entirely, because, if it is in evidence, it is conclusive and settles the question. On this part of the case I have nothing to say; it is as unarguable on this side as on the other. It is a full and free confession of guilt, of being the origin and mover of a murder in all its circumstances unparalleled in our age. When you, and I, and all of us, shall have ended our earthly existence, it will forever remain a strange, a surprising and astonishing event, that in this age so enlightened, and in this country so civilized, in the midst of society so refined, and in a family so respectable, a man could be found so reckless of life, so utterly regardless of the laws of God and man, so insensible to the dreadful consequences of crime, as to go deliberately to work and plan and procure the murder of an aged and venerable and unoffending man. And all for what? For mere pieces of silver, all merely to come earlier into possession of property, or into possession of that which he could not possess but through blood! Gentlemen, it becomes us to entertain a strong compassion for the unhappy individual before you. But it is for his internal rather than his external condition that your pity is to be extended to him. It is his greatest misfortune to be what he is, and not to be where he is. Nothing can better him for time or for eternity, but to be brought to a due sense of the scene before him. We wish

him well, but we are to look at his violation of the laws of God and man. His crimes are great, his acts have been enormous; perfidy to the Government has been added to the catalogue, already black as ink. It is not the least horrible part of this horrible transaction, that his confessions contain no evidence of repentance. There is not one bright spot to be discerned in his destiny, and if it shall not be illuminated even by a ray of penitence, it will be dreadful—dreadful—dreadful—all black.

THE CHARGE TO THE JURY.

JUDGE PUTNAM charged the jury. He sustained the ground taken by Mr. Webster in regard to the conclusiveness of the record of the Court as to conviction of the Principal, unless shaken by some plain and manifest proof of mistake, and that the burden of proof was upon the prisoner. He paid a high compliment to the prisoner's Counsel for the ability, fidelity and independence with which they had defended their client.

It was argued to the jury by the Counsel for the prisoner, that they were judges of the law, as well as of the evidence, in capital cases, and that they ought to reject the confession of the prisoner as incompetent testimony, notwithstanding the Court had admitted it. Upon that point the Court instruct you as follows: The proposition that the jury are judges of the law as well as of the fact, is not true in its broadest sense. It requires some qualification.

As the jury have the right, and, if required by the prisoner, are bound to return a general verdict of guilty or not guilty, they must necessarily, in the discharge of this duty, decide such questions of law as well as of fact as are involved in this general question; and there is no mode in which their opinions upon questions of law can be reviewed by this Court or by any other tribunal. But this does not diminish the obligation resting upon the Court to explain the law, or their responsibility for the correctness of the principles of law by them laid down.

The instructions of the Court in matters of law may safely guide the consciences of the jury, unless they know them to be wrong. And when the jury undertake to decide the law (as they undoubtedly have the power to do) in opposition to the advice of the Court, they assume a high responsibility, and should be very careful to see clearly that they are right.

Although the jury have the power, and it is their duty to decide all points of law which are involved in the general question of the guilt or innocence of the prisoner, yet when questions of the law arise in the arraignment of the prisoner, or in the progress of the trial, in relation to the admissibility of evidence, they must be decided by the Court, and may not afterwards be reviewed by the Jury.

Mr. Justice Buller, when delivering the opinion of the twelve judges of England in the case of the *King v. Atwood & Robbins*, states the law upon this point,: "If a question be made respecting the competence (of a witness) the decision of that question is the exclusive province of the Judge, but if the ground of the objection go to his credit only, his testimony must be received and left with the jury, under such directions and observations from the Court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision in the case." 2 Leach, 522, case 201.

If the Court reject this testimony, the jury have no means of receiving it against the opinion of the Court. So if the evidence is admitted by the Court, the jury must take it. They cannot reject it as incompetent. They are confined to its credibility and effect.

In weighing the evidence, the jury will examine and consider the manner in which it was obtained, and was given, as well as all the circumstances applicable to it; and if, in view of all the facts and circumstances proved, it is, in their opinion, unworthy of credit, they will disregard it in their decision of the case, as being incredible, although they cannot reject it as incompetent.

THE VERDICT AND SENTENCE.

November 13.

The *Jury*, having agreed on Friday evening, after the adjournment of the Court (after deliberating about five hours), were in their seats, this Saturday, and the *prisoner* placed at the bar. The usual formalities on receiving the verdict took place, and the verdict of guilty was pronounced. The prisoner manifested a considerable degree of firmness during the solemn ceremony, but there was a deathly paleness upon his countenance, evincing an intense working of the mind, and a deep sense of the horror of his situation. As soon as the verdict was recorded, the *prisoner* was remanded.

November 15.

This afternoon, before the jury to whom the case of George Crowninshield was committed, came in with their verdict, *Joseph Jenkins Knapp, Jr.*, was brought into Court, to receive the sentence of the law.

JUDGE PUTNAM: Joseph Jenkins Knapp, Jr., you have been regularly indicted, tried and convicted as an accessory before the fact to John Francis Knapp, in the murder of Joseph White. You have had Counsel assigned at your request to assist in your defense, who have with great fidelity and ability urged all matters, whether of fact or of law, which could be suggested. But, after great consideration, the Jury of your own selection have found you guilty; and the Attorney General, in the name of the Commonwealth, hath demanded of the Court that the sentence of the law should now be passed against you. Upon an inquiry in that behalf, you have shown no cause or reason why the Court should not now comply with that demand.

Before we perform that duty, we are desirous of preparing your mind, so far as it is in our power, to meet the tremendous doom which awaits you. It is not to aggravate your sufferings, that we would address you, for your present wretchedness excites feelings of compassion and not of indignation. But we hope that by presenting to your view some of the horrible circumstances which have attended the crime for which you are to suffer, we may lead you to sincere contrition and repentance.

The aged sufferer was a near relative to your wife. She was nurtured at his house and loved and cherished by him as a child. You were admitted to partake of his hospitality. You availed yourself of the opportunities to visit at the house of the deceased, to prepare the way for the entrance of your hired assassin, to the bed chamber of the victim.

You were for months deliberately occupied in devising the ways and means of his death. Horrible to think, while you were eating his bread, at his own table, you were plotting against his life. The execution of this awful conspiracy spread dismay, anxiety and distrust through the country. Week after week passed away, and left the dreadful deed veiled in mystery. At length a discovery was made by means almost as extraordinary as was the crime.

If such events had been set forth in a work of fiction, they would have been considered as too absurd and unnatural for public endurance. The story would have been treated as a libel upon man. Who would have imagined that young, well educated men, having respectable connections and means of living, could have been found in our cultivated society, ready to join in such a fearful conspiracy? Who would have imagined that the clue to the discovery should have been given by one wholly unknown to the author and procurer of the murder, and that he himself should have put it into the hands of the friends of the deceased? Who that considers these things will fail to discover an overruling Providence, which baffles all human devices and contrivances to conceal great and deadly crimes?

This murder was done with the greatest secrecy, in the hour of night, by the hands of the assassin alone, who escaped from the house without discovery. The knowledge of the crime was confined to the breasts of the conspirators. But they could not keep it there. It would come out. And what was done in secret and in darkness is now by the conspirators themselves made manifest to the world. One of these miserable men has perished by his own hand. The arm of justice hath overtaken another, who has suffered an ignominious death, and the same penalty is about to be re-

quired of you, who were the abandoned author, contriver and procurer of the deed of death. The wicked and profligate will note well these awful events. They will, they must, see misery, disgrace, ignominy and death, following in quick retribution for the most secret crimes.

While we present these dreadful events to your consideration, we would earnestly hope that you may be able to offer to the Throne of Grace, a broken and contrite heart. We beseech you to call to your aid those pious men, whose duty it is to teach the consolations of our holy religion. Under their direction and the assistance of the Holy Spirit, may you by prayer and penitence obtain the forgiveness of the God of mercy for your offences; and especially for the awful crime for which you are to suffer.

Our last duty remains to be performed, which is to pass the sentence of the law, for the crime of which you have been convicted, which sentence is, and this Court doth accordingly adjudge, that you are to be taken from hence to the prison whence you came, from thence to the place of execution, and there be hanged by the neck until you shall be dead. And may God of his infinite grace have mercy upon your soul.

The Prisoner, during the delivery of this address, exhibited an appearance of wretchedness, which could not but excite commiseration. When asked by the Judge whether he had aught to say why sentence of death should not be passed upon him, he was apparently unable to make an articulate reply, and answered in the negative by a very slight motion of the head. When the allusion to his wife was made, there was a perceptible agitation of his whole frame, and it appeared to be with difficulty that he sustained his standing posture. Soon after his return to prison, however, he recovered his former composure.

THE EXECUTION.

From the *Salem Register*, January 3, 1831.

On Friday morning, December 31, sentence of death, by hanging, was executed upon Joseph Jenkins Knapp, Jr., convicted as accessory before the fact in the murder of Joseph White.

The arrangements for the awful ceremony were precisely the same as at the execution of John Francis Knapp, and were carried into effect with the utmost precision, and without accident or inter-

ruption. The High Sheriff, his deputies, and the constables of the town, conducted the proceedings and formed the only guard to preserve order among the spectators, and no other guard was required—the deportment of the assembled multitude, as on the former occasion, being that of a people conscious that they had character at stake, and determined to preserve that of good citizens. The number of spectators was about as large as at the execution of the younger brother (perhaps from 4,000 to 5,000) but we were gratified to observe the number of female witnesses of the dreadful scene was greatly reduced.

The Rev. John P. Cleaveland visited the wretched criminal daily during the last two weeks of his existence, and was with him from 7 o'clock on the morning of the execution until he was launched into eternity. Mr. Cleaveland was requested by the Sheriff to be present during the reading of the death warrant in his cell when it was received from the Governor, and after that, Knapp, of his own accord, requested that reverend gentleman to visit him as often as he could, till his death. Mr. Cleaveland has informed us that Knapp expressed a wish to him, repeatedly, and in particular on the morning of the execution, that he could have had opportunity to warn his companions against the consequences of dissipation and sin, and told him just before he left his cell, that he was persuaded it would have saved him from ruin, had he always regarded the Bible in the same light in which he viewed it then. He repeatedly admitted the perfect justice of his sentence. Mr. Cleaveland was requested by Knapp to visit both him and his wife, in the cell, a day or two before the execution, when the agony which they both exhibited was truly heartrending. The last interview between the wretched couple was on the evening previous to the execution. The anguish and distress evinced by both is said to have been indescribable. She was unable to support herself on leaving the cell, and his agony and emotion produced by the sad interview continued till past 11 o'clock at night, when he occupied about fifteen or twenty minutes in reading the Bible, then became immediately composed, and soon afterwards fell into a quiet sleep, which was not disturbed until 5 o'clock in the morning, when he rose and dressed himself with care, and again resorted to his Bible. He partook of refreshment both in the evening and the morning. The Rev. Mr. Cleaveland visited him before 7 o'clock A. M., and from that time until he was carried out of the prison, he appeared composed and calm, but completely absorbed and amazed by the scene before him. The religious services were performed in the cell.

Precisely at 9 o'clock the prisoner was brought from his cell, his arms were pinioned, and, accompanied by the clergyman, the Sheriff and his deputies, walked to the gallows, on the north side of the jail; and although pale and emaciated, his step was steady, his body erect, and he gazed around with calmness when he was proceeding towards the fatal scaffold. He was very genteely dressed in a dark frock coat and pantaloons, black silk vest, boots, etc. No want of composure or firmness was perceived, until

during the reading of the death warrant by Sheriff Sprague (which was done in a very audible and emphatic manner), when Knapp trembled so much that the reverend clergyman found it necessary to support him. This, however, it is supposed, might have been partly occasioned by the effect of the chill air upon his feeble frame. As soon as the warrant was read, the criminal ascended the trap, the rope was adjusted, the white cap drawn over his face, and in a moment he was launched into the world of spirits.

Signs of life, by slight spasmodic strugglings, were perceived for about five minutes, and after a suspension of half an hour, the body was taken down, placed in a coffin and carried into the jail. In the afternoon, the body was given up to the family of the deceased, and was interred in the Howard Street Burial Ground in the evening.

Thus perished Joseph Jenkins Knapp, Jr., the third of the unhappy men who have been cut off in the midst of their days, in the prime of life, for their participation in a crime unparalleled in all its circumstances, in the annals of our country, if not of the world. It is hoped the example afforded by this terrible infliction of the penalty of the violated laws will have a salutary influence in deterring others from vice and crime. In the language of one of the victims, he who perished by his own hands: "May it be the means of reforming many to virtue: Albeit they may meet with success at the commencement of vice, it is short lived, and sooner or later, if they persist in it, they will meet with a similar fate to mine."

It is understood that Knapp made professions of penitence, and appeared to be religiously impressed with a sense of his situation for some time previous to his death, but the sincerity and reality of these professions and appearances must be left to the judgment of Him who is alone competent to search the hearts of men.

We are authorized to state that the report that Knapp made a disclosure of further facts relating to the murder to the Rev. Mr. Cleaveland, is entirely unfounded.

THE TRIAL OF GEORGE CROWNINSHIELD AS AN ACCESSORY IN THE MURDER OF JOSEPH WHITE, SALEM, MASS- ACHUSETTS, 1830.

THE NARRATIVE.

Immediately after the proceedings in the trial of Joseph J. Knapp were over and while the Jury were considering their verdict, the trial of George Crowninshield was begun before the same Judges. He was a brother of the real murderer, and there were many circumstances that pointed to him as having had a knowledge at least of the conspiracy, and that the murder of Captain White was its object. But Daniel Webster did not appear as one of the Commonwealth's counsel, the proof of the participation of George was by no means conclusive, and as two men had already been sent to the gallows for the same act, the Jury gave him the benefit of the doubt and returned a verdict of not guilty.

THE TRIAL.¹

In the Supreme Judicial Court of Massachusetts, Salem, November, 1830.

HON. SAMUEL PUTNAM, ²	} Judges.
HON. SAMUEL S. WILDE, ³	
HON. MARCUS MORTON, ⁴	

November 12.

This afternoon, a Jury was impanelled for the trial of George Crowninshield, indicted as an accessory in the murder of Mr. White. The prisoner exercised his right of peremptory challenge in but four instances, and three jurors only were challenged for cause.

¹ *Bibliography.* Salem Register, November 15, 18, 1830; Pickering's Massachusetts Reports, Vol. 10, and *ante*, p. 404.

² See 1 Am. St. Tr. 108.

³ See 4 Am. St. Tr. 99.

⁴ See *ante*, p. 405.

Perez Morton, Attorney General,⁵ and *Daniel Davis*,⁶ Solicitor General, for the Commonwealth.⁷

*Samuel Hoar*⁸ and *Ebenezer Shillaber*⁹ for the Prisoner.

The indictment was read by the *Clerk*. As in the case of the *Knapps*, it charged him in various forms with being an accessory to the murder.

Mr. Shillaber objected to the prisoner's answering to any part of the indictment except that which charged him as accessory to John F. Knapp, and the COURT so directed. When asked by the *Clerk* whether he was guilty or not guilty, he replied with peculiar emphasis and energy, "I am not guilty, so help me God!"

The Jury, sworn to try the case, were Edward Ford, Foreman; Samuel G. Ashton, Jacob Batchelder, Enoch Bradley, Jr., Nath'l Bowman, Azor Cole, Asa Currier, Aaron Day, Isaac Dodge, Dudley Evans, Benj. Edwards, Samuel P. Fowler.

MR. DAVIS' OPENING.

The *Solicitor General* opened the prosecution. He adverted to the atrocity of the crime, the tremendous consequences of the issue of the trials, as they respected both the public and the prisoner, and the excitement that the horrid crime which occasioned the prosecution had created. He stated that he should confine himself in the management of the case simply to the statement of the facts, the explanation of the offense of which the prisoner stood accused, and to such remarks upon the law and evidence in the case as might aid the Jury in their deliberations, and in enabling them to discharge their duty with impartiality and faithfulness both to the prisoner and their country; and he consoled them with the assurance that in every doubt or difficulty they might meet with, they would have the aid and advice of the able and learned Justices of the Court. He observed that there were many counts in the indictment, some of which he thought were unnecessary, and stated that

⁵ See 1 Am. St. Tr. 109.

⁶ See 2 Am. St. Tr. 551.

⁷ Mr. Webster had a prior engagement in an important cause in another State, and could not lend his aid in this trial.

⁸ See *ante*, p. 412.

⁹ See *ante*, p. 412.

if they found the prisoner guilty upon any one of them, it would authorize the Court to pass judgment upon him. He then read the statute upon which the indictment was founded, and adverted to and explained that part of it upon which the prisoner stood charged, viz.: as being an accessory before the fact to the murder of Joseph White, J. F. Knapp being alleged in the indictment to be the principal felon.

The *Solicitor General* made a statement of the evidence which he expected to bring forward against the prisoner; and a general exposition of the law of crimes relative to principal and accessory. As to the first he expected to prove that the murder of the deceased was the result of one of the most atrocious, cold-blooded, and fiend-like conspiracies that ever was conceived of and matured by the cupidity and malice of man, originating with J. J. Knapp, Jr., from the most paltry as well as diabolical motives of destroying the will and the life of the deceased at the same time, for the sole purpose of acquiring a portion of Capt. White's fortune, one of whose nieces, he, Knapp, had married. That this horrid design originated as long ago as January last; and that it was distinctly communicated to his brother, J. F. Knapp, in the month of February last, who without hesitation or remorse joined with him in the accomplishment of the infernal object. The public know that these two brothers have been convicted of the crime of the murder of Capt. White, committed in pursuance of this conspiracy, and that one of them has suffered the punishment he so justly merited, a public execution. The sum to be given as the price of Capt. White's blood was named and offered, agreed upon, and J. F. Knapp agreed to procure and engage the assassins. The Crowninshields were applied to, one of them undertook the bloody work, murdered an innocent old man in his bed and in his sleep. The other is the prisoner at the bar, now on trial, whose life you now have in charge. The circumstances which led to the detection of the authors and perpetrators of this unheard of assassination, were most remarkable and providential, and will be explained to you by the witnesses upon the stand.

The law relative to principals and accessories in murder, was then explained by the *Solicitor General*. The statute of the Commonwealth was read. And the common law relative to the trial of principals and accessories was adverted to and explained. By the ancient English criminal law, an accessory cannot be tried without his consent, before the trial and conviction of the principal felon. This principle of the common law originated in the dark and ignorant ages of English jurisprudence, but it has been recently abrogated in England by a statute made in one of the last years of the late King. It stands conspicuously among others, recently adopted under that reign, by which the criminal jurisprudence of England is greatly improved.

The ancient principle of the common law above referred to was adopted by our ancestors, and has been and is now the law of our land. Accordingly the first document that was produced in the present prosecution was the trial and conviction of John F. Knapp.

An accessory before the fact is he who, being absent at the time of the fact committed, doth yet procure, counsel, command or, abet another to commit a felony.

The description of this offense was given in the most perfect manner and elegant language by the late Chief Justice Parker, in his last charge to the Grand Jury in this county:

"An accessory before the fact is often more criminal than the principal. He may be absent from the scene and not know the time and place; but he has previously counselled the deed to be done. His crime is deemed as great as he who strikes the blow. In a moral view it is often greater. It may contain a greater number of diabolical motives, without which the crime would never be committed. It denotes the savage heart of the murderer, without his bold and daring hand. It puts in peril his own soul; and the souls of others, who but for him might have gone free from the guilt of blood. For these reasons the law punishes the accessory before the fact, as the actual perpetrator. They are both murderers."

Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is a principle of law, that can never be controverted, that he who procures a felony to be done, is a

felon. The best writers on the law agree that persons procuring, and even consenting beforehand, are accessories before the fact. Principal and accessory may be indicted in the same indictment, and tried together, which is the best way. When the accessory is brought to trial after the conviction of the principal, it is not necessary to enter into a detail of the evidence on which the conviction was founded. The record of the conviction is sufficient evidence against the accessory to put him on his trial; for it is founded on a legal presumption that everything is rightly transacted.

November 13.

On the opening of the court the *Jury* came in with a verdict in the case of Joseph J. Knapp, Jr.

THE WITNESSES FOR THE COMMONWEALTH.

Benjamin White, Miss Kimball and Dr. Johnson proved the murder. Their testimony was the same as on the trial of Knapp. See *ante*, p. 428.

John R. C. Palmer. Was visiting at the house of the Crowninshield's the latter part of last March and early part of April. In afternoon of 2nd April, about 2 o'clock, Frank Knapp came up there with Mr. Allen; they both were mounted on white horses. Was at the time in the chamber with the two Crowninshields. Somebody came to the door and called George, and he Richard, Knapp and Allen, all went down together; I looked out at the window, and saw Richard with Allen. About 4 o'clock I saw them all four again. I do not know where they had been in the meantime. When they walked away, George and Frank went together, Allen and Richard went the same way, but at a little distance. After their return, George and Richard both came into the chamber where I was. George said, Frank Knapp wanted him (George) to kill old

man White, that Frank said his brother Joe wished him to kill him, and that Joe asked Frank to come out and make the proposition to George. George said he asked Frank why Joe wanted him killed. Frank answered that Joe supposed Mr. White had made a new will, leaving most of his property to a Mr. White that lived at the Tremont House in Boston; that Joe wanted this will destroyed, so that an old will which was in existence might hold good. Frank said, old White had gone to his farm that afternoon, and that he went by the way of the iron factory, to save toll. Frank told George that Joe would pay a thousand dollars when the murder was committed; don't recollect that Richard made any remark.

George said Frank asked him for an answer then, but he told him that he could not answer at that time; he would see him at 7 o'clock in the evening, and give him an answer. George then made the same proposal to me, that Frank had made to him, and

asked me if I would kill the old man. He said I was poor and had no funds; this would be a good chance for me. Richard told me it would be a good time for me to go out that afternoon, and meet him on the road, and overturn his carriage; it must inevitably kill him, he was so old. George told me, if I would go on and kill him, I should have a third of the thousand dollars, which Joe would give. I told him that I should not have anything to do with it whatever.

Richard said to George that the story was too foolish a story to be palmed off upon him. George said he had made April fools of us. When he said that, Richard said: "Not so fast; yesterday was fool's day." George said, "he had made a fool of himself, then," and laughed.

The same evening, between 6 and 7, Frank came out again in a chaise. When he returned, he carried Richard away with him in the chaise. Richard said—

Mr. Hoar objected to Palmer's stating what Richard said, in the absence of the prisoner at the bar.

Mr. Skillaber. There seemed to be no such proof as would make such declarations admissible. He would not then undertake to show the worthlessness of Palmer's testimony, but argue upon it as if it were true. His evidence is that Frank and Allen, Richard and George, were together. He saw them all walk away together, George and Frank ahead. Shortly afterward, they returned in the same manner. There does not appear to have been a single moment's private conversation between Frank and the prisoner, and it is not to be presumed in the absence of proof. It is as little to be presumed that the conversation took place in the presence of Richard and Allen, because Allen is altogether free from suspicion. Besides, if the witness is to be believed, Richard heard nothing about it till George told him in the chamber.

JUDGE WILDE. It is not necessary for the witness to prove, but for his evidence to tend to prove, a conspiracy.

JUDGE PUTNAM. The proper way of proceeding at this stage is to assume the evidence of witness to be true, and argue from it accordingly.

Mr. Skillaber. If the conversation in the chamber did actually occur, it is no proof of conspiracy. There must be satisfactory proof that at the time of the conversation there was a conspiracy. But on the contrary, the proof is now that no such conspiracy existed. George did not agree to assist Frank in the murder, or anybody else. He listened to the proposition in silence, as any honest man might, and merely answered that he would reply at a future time. Whether this future answer was ever given or not, the reply proves that he had then formed no determination with regard to the proposition. The witness states that George, after detailing his conversation with Frank, asked Palmer if he would commit the murder for a third part of the sum offered by Joseph Knapp. This question might have been asked, whatever con-

clusion George had come to, or if he had come to no conclusion. He might have been undetermined, as to what part he should take, and have wanted an answer to assist him in coming to a determination. Or, what is still more probable, the question was asked in jest. It does not appear at all that the prisoner was a co-conspirator with Richard and Frank, in the murder, so as to admit a declaration of Richard's, made in his absence. It must appear that George consented to take a part in the murder before it is admissible. But the evidence is directly the other way. The reply of the prisoner, when the proposition was made to him, was, "I'll give you an answer at another time." There was then no conspiracy existing at that time; and it follows that, there being no conspiracy, Richard Crowninshield was not a co-conspirator, and no declaration of his, made in the absence of the prisoner, can be adduced in evidence.

Mr. Hoar. Unless the main principle advocated by Mr. Shillaber were admitted, the manifest absurdity must follow, that whenever a conspirator proposes to another individual to join his conspiracy, and the individual applied to refuses, if the conspirator proceed immediately to consummate the crime, the individual to whom it is proposed becomes responsible for all its tremendous consequences. This application of the doctrine of conspiracy, is worse than conspiracy itself. Besides, the testimony of Palmer is utterly unworthy of credit. With the consent of the Court, we shall introduce evidence to show that his testimony was no more to be regarded than that of a parrot.

Mr. Morton and *Mr. Davis* contended that Palmer's testimony was to go before the Jury, and they were to judge of its credibility. They would inform the Court that they expected to corroborate his testimony in every substantial particular, by other witnesses.

The COURT. The question is, whether Richard Crowninshield was a co-conspirator, and whether a declaration of Richard, in the absence of George, is proof against George. If there is proof of conspiracy to murder, it is of no consequence by whose hands the deed was to be done. The proposition was made to George by Frank, and by George told to Richard. The murder has been effected, and whether they agreed to commit it is the question. With regard to Richard's agreement to the proposition made by Frank Knapp, Palmer states that Richard said, "it would be a good time that afternoon." Previously, George had asked Palmer to do it, and urged as a reason that he was poor, had no funds, and this was a good chance. Richard, to induce Palmer to consent, proposes means to overturn Mr. W's carriage, on his return from the farm, to make it appear that his death was accidental. The Court are of opinion, therefore, that there is evidence sufficient to show, supposing it to be true, that George and Richard came into the proposition, and that declarations of Richard, made in the absence of George, should be admitted. The evidence of the witness must go to the Jury, and they must judge of the degree of credit to be given it.

Palmer. Richard told me they were going to the Mineral Spring. Frank stayed over half an hour. Richard said he should return at 11 o'clock that night; think it was about 11 when he returned. At this time there was no other conversation between us about the murder of Mr. White. Never heard George Crowninshield say anything about the dirk with which the murder was committed. He said he melted down a dirk, the morning after the murder, because a committee had been appointed to search houses for arms, etc., and it would be a bad sign to have it found. George said Frank Knapp told him the housekeeper would be absent at the time of the murder.

Cross-examined. Had no particular business; was there on a visit, at George Crowninshield's invitation; had been there a week or ten days, when I left, which was on the 3rd of April. None but George and Richard knew I was there, that I know of; don't know what you mean by "concealment;" was not hid there; had no objection to anyone knowing of my visit; if there was any objection, it was on the part of the Crowninshields. The first time I went there, it was at 9 o'clock in the evening, with Richard Crowninshield, from Lynn Hotel. Previously, on the same day, I had seen them both, and received a message from George. During all the time I was there, I never went downstairs in the day time, to associate with any other members of Mr. Crowninshield's family or his workmen. It is not my custom, at all my boarding places, to keep myself thus secluded. It

was the request of the two Crowninshields that I should not mix with the people of the house. don't know the reason. I believe there were a great many workmen about the house. I never left the house in the day time, that I know of, but went outdoors when I was going away. I know no reason why the Crowninshields should have desired concealment; they gave none. I assumed the name of Carr about this time; have no other reason to give than that I preferred it. I assumed, besides, the names of Hall and Crowninshield; preferred the name of George; had no reason for preference. I contracted a debt in the name of George Crowninshield, and left the person to whom I was indebted, without letting him know that I was not George Crowninshield; don't recollect that I ever gave a note with George Crowninshield's name; prefer not to answer whether or not at that time I signed a note with a name not my own. My business was, residing at the Lafayette Coffee House. After leaving the Crowninshields I went home to Belfast. From there I wrote a letter, directed to Joseph Knapp, intending it for Joseph Jenkins Knapp, Jr., for the purpose of ascertaining whether he had any part in the murder, for the purpose, if he had, of communicating the fact, to have justice done. Asked for money to obtain his confidence; was arrested at the post office in Prospect (Me.); was committed to Belfast Jail for further examination; stayed there from the 23rd of May to the 2nd of June, when I was removed to Salem; was brought in irons, put in a cell, and kept there

about a month. Had no money when brought from Belfast here; have received a hundred dollars, and no more, since been here, for attendance at Court; have no promise of more, except regular witness fees. When I visited the Crowninshields, on the 9th of April, I found a hatchet in their machine shop, and having seen in the papers that it was supposed the murder was committed by a hatchet, and seeing one there, with the end newly sawed off, I supposed that might be the hatchet with which the murder was done; I threw it either into a chest that was by, or upon a cross beam in the shop. Never heard that a hatchet would fit the wound. Was anxious to know if George and Richard had any part in the murder or not; went up between 11 and 12 o'clock at night; think that is later than the common bedtime in Danvers; thought that at midnight I might find them at home; not sure whether they worked in the machine shop in the day time or not; spoke under the window to George, who opened it and asked who was there; told him and asked him to come down, I wanted to see him; he asked if I had heard the news; told him I had; he said neither he nor Richard had any hand in it. I went in, and Richard asked me if I had heard the music in Salem. I told them they were suspected; Richard said yes, said Reed had been up there that afternoon, said after finishing some cloth to raise funds he should go to New York; told him it was a bad time, his going would fix suspicion. George

said it would not do for me to stop there, because the public mind was excited, so that strangers would be suspected; recollect nothing more; had no business in the neighboring towns; had no wish to conceal myself while at the Crowninshields; they wished me to be concealed. The last two or three years have been engaged in picking stone at the State Prison in Maine; believe I had had no business since I left prison. At the time the proposition was made to me to murder Mr. White, I did not believe they were serious. Richard Crowninshield appeared as ignorant as I about the matter! Thought it quite possible they might be serious; did not communicate the plot to Mr. White or his friends here, because I thought at first they were not in earnest; went up there, after the murder, to ascertain whether they were guilty or not; didn't expect they would tell. Decline answering whether I had any agency in stealing Mr. Sutton's flannels. My only motive for writing to Knapp was a desire that justice should be done; had no expectation of reward; don't recollect that I have stated upon the stand that Hatch anticipated me; have sometimes thought I might be entitled to a reward. Didn't know Hatch had told anything, when I made my communication to the committee; never threatened the committee with unpleasant consequences, if they did not do something for me. Stayed in prison involuntarily; when I left the Jail, I did not leave any letter in my cell, that I recollect, for Mr. Waters.

The *Solicitor General* read the letter, designed by Palmer

for Joseph Jenkins Knapp, Jr., which led to his own apprehension, and to the detection of the murderers.¹⁰

Benjamin Leighton, a hired lad, at the farm in Wenham, testified as on the former trial, to the conversation between Joseph and Francis Knapp, overheard by him at the end of the avenue leading from the farmhouse to the pasture, when Joseph asked Frank when he saw Dick; when he was going to kill the old man; and added if he doesn't do it soon, I won't pay him. He further testified to Frank's coming to the farm very late in the evening about a fortnight subsequent to the murder, in a chaise, with another individual, who remained in the chaise, as he supposed, at the gate, and with whom Joseph went out and held some communications.

Thomas Hart, another hired man at the farm, testified to Frank's possessing a dirk, and having one night pricked Leighton with it through the bed clothes; and also to the visit at Wenham, of Frank Knapp and another individual in a chaise in the evening as attested by Leighton.

Ezra Lummus, tavern keeper in Wenham, testified that Richard Crowninshield and another person whom he did not know, came to his house twice, the latter part of March, and about a fortnight after the murder. At second visit they passed a five-franc piece.

Joseph Shatswell testified that Joseph J. Knapp, Jr., received from Guadaloupe a bag of five-

franc pieces.

George Smith and *George Felton* testified to receiving a five-franc piece from George Crowninshield the evening before his arrest.

Mary Jane Weller. George Crowninshield slept at my house on the night of the murder. Next morning Mr. Stearns told us of the murder, and I went into the room where George was sleeping, and told him. He appeared to be agitated, but no more so than I was; wanted to go down to Capt. White's, to see the body, but George was unwilling to have me go; supposed that was because if I went, Mary would want to go, and he did not think it safe for Mary to see such a sight in her situation at that time. George stayed in my house all that day, and went away about dark.

Benjamin S. Newhall testified to seeing George Crowninshield, the evening of the murder, about 10 o'clock, passing down Williams street.

Daniel Marston swore to receiving two five-franc pieces from prisoner, the evening before his arrest.

William Osborne testified to letting horses to W. H. Allen and Frank Knapp.

Thomas W. Taylor testified to seeing prisoner pass his shop in Newbury street the night of the murder. A man was with him.

Nehemiah Brown swore to finding Richard Crowninshield dead in his cell, after his suicide.

¹⁰ See *ante*, p. 438.

Mr. Hoar. It would be absurd to attempt to defend a case made out like this. There is not a tittle of evidence to criminate the prisoner, except that given by Palmer, which was altogether unworthy of credit. It is not a case weakly made out; but it is one not made out at all. Such a case ought not to be suffered to go to a jury.

The Court was of opinion that it could not interfere.

The *Attorney General* would not press the suit if the Court thought there was not a possibility and even a probability of conviction.

Mr. Shillaber. It has been the design of defendant's counsel to prove that he was honestly engaged in the transaction of business relating to his mechanical trade, up to a late hour on the evening of the murder. A great part of the testimony introduced by the Government, was the same they had intended to make use of. If the Court thought it necessary, they had one or two other witnesses to the same purport, which they would introduce to show that he was about his business. We do not wish to consume the time of the Court by making an unnecessary argument, and would therefore call two witnesses in addition to those brought by the Government, and on Monday morning my senior counsel would close the case.

The indictment and record of the conviction of John R. C. Palmer was read. *Mr. Babb* swore to Palmer's giving him a due bill, to which he affixed the signature of George Crowninshield.

November 15.

MR. HOAR, FOR THE PRISONER.

Mr. Hoar. Gentlemen of the Jury: If this was a case where only some few hundred dollars were pending, as the evidence now stands, I should not trouble you with my remarks. I should submit the case without argument. But as the life of a human being hangs suspended on your verdict, I feel it to be my duty to submit to you such views as have occurred to me, of the evidence, on which you are required to give this verdict. In my view, it is impossible to convict upon this evidence. But I have viewed it with the eyes of counsel. I do not consider myself a competent judge. I know that counsel are apt to partake of the feelings of parties. The venerable counsel for the Government have thought proper to present the case for your consideration. You are to be addressed by one of them, to persuade you that it is your duty to return a verdict against the prisoner.

Their Honors have not considered it their duty to interpose and stop the trial. I, therefore, think that I should be wanting in my duty if I suffered it to pass without remark.

I shall not go into a minute examination of this case. Confidence is due to a Jury of my fellow citizens. Your understandings must be convinced, that the case does not require it, that conviction is not necessary to follow because the Government demand it of you.

I will ask your attention to one or two points. The prisoner is charged with causing, hiring or procuring the death of Mr. Joseph White, by the help of John Francis Knapp. He is charged with having influenced or caused this individual to perpetrate this flagitious crime. I mean to concede all the ground the Government can claim. You need not be sure that he was the only hirer. If he hired at all even with others, this will be sufficient. But to justify a conviction, the prisoner must have been influential, must have aided in procuring the crime, must have advised to it. This advice must have had some effect. He must have exercised some influence in the commission of the crime. Of this you are not to be left in doubt. It is incumbent on the Government to prove it. The form of indictment itself shows this. Counselling, hiring, or otherwise procuring are the words of the indictment. These are to be proved, fully proved. This point has been fully considered by this Court, in the case of *Commonwealth v. Bowen*, 13 Mete., p. 359. The important fact to be inquired into is whether the advice given did influence in procuring the death. The prisoner must be shown to have influenced the deed to be done.

George Crowninshield is not charged with influencing Richard Crowninshield to the commission of the crime. But the question is, did George Crowninshield persuade John Francis Knapp to commit this crime. You are to wait until you have satisfactory evidence of this. The Government must show that Mr. White was murdered. This is done. They must prove that John Francis Knapp murdered him. This has been proved in the case recently tried. I do not

mean to trouble you with this question. And he has been convicted therefor. Did George Crowninshield aid in procuring this murder? This is the question for your consideration. What reason have you to look to the defendant as such a person? Where would a rational man look for the author of a deed, but to the one who moved it? Three persons have already paid the forfeit of their lives, or are in a situation to do so, on account of this murder. Here then you have an explanation of it. It is not philosophical, to search for more causes, than are necessary, when sufficient are already known. Notwithstanding Richard Crowninshield was the principal murderer, as the Government say, and John Francis Knapp has also been convicted—a dozen may be convicted if there is found satisfactory evidence of their guilt.

Gentlemen, the case is an important one, and demands our deliberate consideration; but I really can hardly speak with that gravity on the evidence that has been introduced, that the occasion requires.

What, then, is the evidence offered to prove the prisoner the procurer of this murder? It is testified that sometime last spring, Joseph Jenkins Knapp, Jr., received 500 five-franc pieces, that he had agreed to pay Richard Crowninshield \$1,000 for committing the murder, that he did pay to Richard Crowninshield 100 five-franc pieces; and that about this time George Crowninshield is shown to have passed 2 or 3 five-franc pieces, and the same witnesses who say this, say that this is a common coin in this vicinity, and they frequently pass and take them? Just look at this evidence, without prejudice, and suppose the whole as proved, and what does it amount to? Can it for a moment bear against the prisoner? What would Richard Crowninshield be likely to do with this money, suppose he had received it. The two brothers were at work in the same shop, engaged in business together. Would he not have been likely to have passed it to his brother? And are you to presume it was received by George as the price of blood, because it was so passed to Richard? How can George now prove how he came by it?

Richard is dead, and no other person knew. You are to apply the same rules of evidence here as in other cases, and these parts can need no further comment.

One other circumstance I will notice. The Government say they know where George Crowninshield was on the night of the murder—that he was in Salem. This, then, is evidence of his murdering Mr. White! That he was in company with two men who can tell all about it (but they take special care not to call these men upon the stand) and that as he passed the corner of the Franklin Building, a person says to him, “Hallo, George, where are ye bound?” This inquiry is the clencher—this is the conclusive evidence of his having procured J. Francis Knapp to commit the murder! It requires self control to treat such evidence with gravity.

Then comes the female witness on the stand; but who, or what she is, there is no evidence. Whether she be the most pure or the most corrupt, you are left wholly in the dark. The Government have not thought proper to inform you, and it was not my business to inquire. If she be pure, where was the impropriety of George’s being at her house? If she be corrupt, what confidence will you place in her testimony? Take it either way, it can have no influence upon the prisoner. I can conceive of no possible reason why the Government have thought proper to bring her here, unless it were to view her handsome face upon the stand!

We now come to Palmer, the principal witness on which the Government rely to make out their case against the defendant. It is important when a witness testifies before a jury that they should know him, that they should be acquainted with his character, in order to judge what degree of credit is to be given to his statements. When the character of a witness is impeached, you hear cautions from the Bench not to rely upon his testimony; to see whether there is not ground for distrust and doubt; and, if so, you are told a verdict is not to rest on such testimony; you are also told such a witness may tell the truth; his story may be corroborated, and, if so, the law says his testimony may be be-

lieved. But if a witness has been convicted of an infamous crime, such as theft or fraud, if convicted within this Commonwealth, his mouth is closed; the seal of infamy is affixed upon him, the law pronounces it dangerous to rely upon his testimony, and his story cannot be heard. In the present case, how is it with Palmer? A record is produced from a neighboring State, that he has there been convicted of an infamous crime. But the law does not exclude him from testifying. A man of sound sense may naturally ask, how is this? Is it principle? Is it reason? The late lamented Chief Justice laid down rules respecting the admission of testimony of this description, and according to these rules the only distinction between a witness convicted of crime in this and one thus convicted in another State, is this: In the former case the Court are bound to exclude the testimony, and in the latter case they leave it to the judgment of the jury. The moral principle in both cases is the same—moral principles are the same in all States, in the whole universe. Like Him from whom they emanate, they are unchangeable, eternal. You will therefore perceive the duty imposed upon you in Palmer's case. You must find some strong reasons, other than his mere words for believing his story, or it will be your duty to put it out of the case entirely, the same as if his conviction had taken place in Massachusetts. You will conduct the examination of his testimony by principles of the soundest reason. If the law by which such evidence is not respected in this State is founded in reason, then your own reason will tell you that if this man have on his shoulders all the infamy and disgrace which he could have, had his crimes been committed here, his testimony should be put entirely out of the case. There must be some countries, say down East, where a man can get an honest living by stealing, or the moral principles laid down with regard to attained testimony must apply to the case of Palmer. Then let us examine the evidence of this man. He or the Government cannot complain, if we take his own story. He says he came here without business; that he was secreted in the house of Richard Crowninshield, Sr., eight or ten days,

during which time he was never seen by any of the family except George and Richard; that he was thus secreted at the instance of these two young men, and did not know the reason; that nobody else knew he was there, although there were a great many workmen about the house, etc. Under the solemn sanction of an oath, if any solemn sanction can be imposed upon such a being, he asserts that he was thus shut up more than a week and exhibited himself to nobody, merely to please Richard and George Crowninshield. He says he then left them and was absent in the neighborhood, passing under an assumed name, for a time, then returned again at 11 or 12 o'clock at night, giving as a reason for going at that hour that he felt more confident of finding Richard and George at home than at any other time. Yet he acknowledges they were usually at home at work in the daytime. Now attend to what had transpired on the 2nd of April, according to his story. Two men came up there on white horses, Frank Knapp and Mr. Allen.¹¹ Now, gentlemen, if this whole story is true, it does not prove my client guilty at all. Construe this conversation in the strongest light, and it does not make out the offense with which he is charged. To make out the charge, it must be shown that he influenced Frank Knapp to commit murder, that he countenanced and encouraged him to do it. But according to this witness, Frank comes out already prepared for the murder—with offers to procure the murder to be done. He has been convicted of doing the murder, convicted as a principal. Where is the evidence that George Crowninshield procured Frank Knapp to murder Mr. White? And suppose Frank Knapp did make the offer to him, how does it appear that he did not decline it? The Government say that F. Knapp was a principal in the second degree in the murder, that Joseph J. Knapp, Jr., was the accessory before the fact, the instigator offering a certain sum of money to procure it to be done. Follow up the case; in the course of these trials, my client has been

¹¹ *Mr. Hoar* here went over the narrative of Palmer respecting this visit, and the conversations he had with the Crowninshields respecting it.

exposed to every sort of evidence which could be produced; everything which could be hunted up to make out a conspiracy, all sorts of stories from all sorts of witnesses, high and low, have brought to bear against him, and nothing has appeared to show that he is guilty of this crime, that he took any part or lot in the matter. Do you believe this man to have been an accessory, when not a tittle of evidence is brought to bear upon him? Taking Palmer's story for truth throughout, can you come to this conclusion? Taking for truth what Leighton says, is that anything against George Crowninshield? "When did you see Dick?" Not George. Would not something have been said of George had he been in the plot? Yet his name was not mentioned. Taking both Leighton and Palmer's testimony to be entirely true, and my client is safe. Now let us turn to Palmer and see if he is to be credited. I here ask you to apply the common principles of law—old-fashioned, honest principles—you are to execute the same principles, in considering his testimony, which, if his crime had been committed in this State, would have devolved upon the Court. If you find him an altered man, if he now comes before you in a different character from that which the record bears testimony he has before sustained, or if he appears as an accomplice and his story is corroborated by other circumstances, his testimony may have effect. But if you are satisfied that he stands before you with all the moral turpitude which has ever characterized him, with a perfect destitution of moral principles, regardless of all distinctions of right and wrong, then there is no doubt what you will do. Look at his story. He passed in a short time under five different assumed names, with no particular business, going to the house of the Crowninshields at midnight, enquiring about the murder, etc. He says George told him he melted the dagger on the morning after the murder. Compare this with the story of the female witness, about as creditable as Palmer. She says he spent the whole day in her house. Three days after the murder Richard said he was afraid they were suspected, and intended to abscond, after getting out some pieces of cloth. This is a part of

Palmer's story. When the whole town was in a state of the greatest excitement in consequence of a most horrible murder, and large rewards offered for the detection of the perpetrators, persons believing themselves to be suspected, and only two miles off, going to abscond as soon as they have wove and finished off some pieces of cloth! He says that while he was out at Danvers he found a hatchet, and supposing it might have been used in the murder, he secreted it, where he could afterwards find it in order to help him obtain the reward, etc. He says that he then went to Babb's, and passed the night there; that he went without money, but settled for his fare in some way—thinks he contracted the debt in the name of George Crowninshield, but don't know that he gave a note in this name. He thinks he left a silk handkerchief for pay, etc. But what does Babb say? That he came to his house on the night of 9th April, the same night on which Palmer says he was at the Crowninshields, that he was unable to pay his reckoning, and somehow or other left a forged note for 62 cents for the name of George Crowninshield affixed to it. Brother Shillaber and I were a little careless and did not think to inquire of Babb what became of the note; but my venerable friend the Attorney, desirous that the whole truth should come out, from his pure and disinterested regard for justice, pursues the inquiry, and asks the witness what became of the note, not doubting probably that his immaculate witness, who had crawled out of a striped jacket into the dress of a gentleman for the purpose of appearing in respectable company, had since taken it up. Babb replies that he carried it to his wife, but she said the man did not look like the Crowninshields, she did not believe the signature was genuine, and refused to have anything to do with it. He then put it carelessly on the desk, and turned round for a few minutes, and when he again went to his desk, he found that the note was gone, and Palmer was gone. The worthy officer of the Government was no doubt perfectly satisfied that Palmer had taken up the note! But what became of the handkerchief? Did Mr. Babb retain that for his pay? No, he did not even get

so much as the handkerchief—the Committee of Vigilance got that!

Gentlemen, I should wish to be grave on such an occasion as this, but it is not possible to retain a proper degree of gravity when considering evidence like this, brought to affect the life of a human being. I am forced by a sense of duty to ask your attention to this man a little further. I will not go into the numerous other circumstances in his testimony which bear against him. I only ask you to apply the common rules of law and morality to his case. He has the audacity to appear before you to swear against the life of the defendant, but he is not to suppose that he is to pass through this community, and his character not be understood. Who is he, gentlemen? A miserable vagabond, passing from one tavern to another, assuming various names, just emerging from a Pandemonium in a neighboring State, and crawling out into other parts of the land because he does not dare to stay where he is known. He hears of the murder here and takes it into his head to pass this way. He assumes fictitious names, he forges notes to pay his small tavern reckoning, and it so much of an everyday occurrence with him that he forgets whether he committed forgery or not. He follows up the forgery, by stealing the very note, and comes here upon the stand, covered with crimes and infamy, with theft, forgery and perjury stamped upon him, testifying against the defendant at the bar, and the Government say you are to place some degree of confidence in this man's testimony! Are you prepared for this? I have stated the principles by which you are to be governed in considering such testimony. A witness in some measure discredited may be believed, when supported by circumstances, when corroborated by other evidence, say the Government's counsel. But this is not such a case—there is nothing to corroborate this witness—there is no ground for applying to his case the principles laid down. There may be cases in which some degree of truth may be perceived in the story of such witnesses on the stand. Then the same degree of credit may be given to him. I will illustrate the case. Sup-

pose a man should offer you his services, who is in some degree disabled from performing manual labor, but you could judge to what extent, and could see that he is able to render you some service, and could make your contract accordingly. But suppose a man was brought to you without arms, without legs, without a head—that all was severed from his body—and that the person who brought this lifeless trunk should talk about its rendering you services, you would be bound to believe this person precisely as much as you are bound to believe that such a person as Palmer is entitled to credit. It would be as reasonable to suppose that life was not extinct in a human body thus mutilated, as to suppose that every principle of moral honesty is not extinct in John R. C. Palmer. But if it is not so, there is no corroboration of his story. We admit that he did answer some questions true. He said that he had been a tenant of the Maine State prison. This is corroborated. How? Why, the record is produced to substantiate the fact. He had heard the record read and saw a gentleman from the Maine prison here, who he suspected might know something about it, and he considered it useless to deny the fact. This, we suppose, the learned Attorney General will call corroboration! He says that large rewards were offered, etc. You all know this to be true, and this, too, is corroboration! It corroborates, just as much, the supposition that he was himself one of the vile gang who perpetrated the murder, and that he puts what belongs to himself upon the shoulders of George Crowninshield. There are no other corroborations than such as these. Where the Government might inquire as to corroborations in regard to parts of his story which might be of some importance to the case, they don't do it. He says he saw George with Frank Knapp and William H. Allen with Richard, walking, etc. Why is not Allen produced to state what conversation took place. We have a right to presume that he could have stated nothing which would bear against the defendant at the bar, or he would have been brought here to testify against him.

The *Attorney General* explained that Allen had gone to sea, in the hurry of the former trials, before measures could be taken

to secure his attendance at this trial, and could not be produced; and made some allusion to what Allen had before testified, which the COURT decided to be improper. *Mr. Hoar* contended that he had a right to presume that Allen was not here because the Government did not want him here; that he could tell all that took place, and is not produced to tell it, because it was nothing against the prisoner. The COURT decided that the argument was a fair one, and checked several interruptions of the Attorney and Solicitor Generals. The COURT again said, if Allen's evidence was material to the case, the Government should have moved a postponement, but they had no right to allude to that evidence. The *Attorney General* asked if they might not introduce proof to show why Allen was away? The COURT could not see the propriety of this. The *Attorney* and *Solicitor General* thought that *Mr. Hoar* had charged them with secreting evidence, but *Mr. Hoar* disavowed such a charge. He said he believed that they had managed the cause in the best way for the Government, but that he had a right to infer that Allen, the best witness on the subject of that interview, whom they had in their power, could not state anything material to their case, that he saw no such thing as a private interview, or he would have been brought here to state it, and the jury is bound thus to infer.

Mr. Hoar. I have occupied too much attention upon this worthless man, Palmer. An insect, the smallest fly is not worthy of much regard, but if it forces itself into your eye, you must attend to it.

The *Attorney General* here called a witness, *J. H. Lathrop*, to prove a visit of Mr. White to his farm, alone, in a wagon, on the 2nd of April.

Mr. Hoar. Have you got through with your opening, Mr. Attorney?

The *Attorney General.* We may wait for Mr. Allen yet.

Mr. Hoar. I think it somewhat late to introduce evidence, but suppose it is right. I believe my client to be as innocent as any person in this hall. Not innocent merely in a technical sense, but innocent of any moral guilt in regard to this murder, and I care not how much evidence they introduce. I wish that everything may be brought against him which can be produced, for I wish him to go from this place entirely clear of suspicion. I will now revert to Palmer. Suppose he was to impute the slightest fault to any of your neighbors, and should ask you to believe him, would you hesitate to kick him from your presence? Suppose there was another man as low as Palmer, if your imagination can

carry you so low, and he, Palmer, should come and tell you that this vile wretch had committed a murder or any other crime, you would be apt to say to him, this is likely enough, it is his course of life, it is consistent with his character. But you are as likely to tell a lie about it, it is equally your business to lie, and it is just as probable you are telling a falsehood about this matter. No, gentlemen, you would not believe that a rattlesnake had struck at its object on such evidence. Suppose this same Palmer was about to return to his home down East, and you had sent a ten-dollar bill by some neighbor who was travelling in the same direction, and he should entrust it to Palmer for safekeeping, knowing his character! Would you not think that your neighbor should make good the loss? Yes, and he could be compelled to do it, and might think himself fortunate if he should escape being called a knave or a villain himself, and an accomplice of Palmer, for not having had the common sense to see the danger of entrusting the money in such hands. And yet the counsel of Government are asking you to place confidence in this man, when the life of an individual is at stake. Yes, gentlemen, a man would be thought an idiot or a knave who would entrust him with a dollar, and yet you are asked to believe him in a case of life and death! If anything can be more absurd than this, I don't know what it is. I should have no confidence in our boasted trial by jury, if I thought it possible for a jury to convict a man on such evidence. But, gentlemen, I have entire confidence in you, and believing my client to be perfectly innocent, I have no doubt he would be safe in your hands if a whole regiment of such witnesses were to appear against him.

THE ATTORNEY GENERAL FOR THE COMMONWEALTH.

Mr. Morton closed the argument for the Government. His address was brief. He thought it an unsuitable occasion to make a laughable address to a jury, as the prisoner's counsel had attempted to do. He contended that the evidence of Palmer was corroborated in several material parts, and stated the particular facts which he thought amounted to corro-

boration. He said the conspiracy was proved, and the great question was if George Crowninshield was one of the conspirators. If so, he should be punished, and no respectable jury would hesitate to convict all who had a hand in such a conspiracy. The jury would not hesitate to believe the story Palmer has told, if it had come from a respectable citizen, and they would not go out of their seats to convict the prisoner on such evidence. But no respectable citizen would associate with such a band of conspirators, and, of course, there is none to tell the story. The character of Palmer, the gentleman says, is bad. We grant it, but it is not so black as that he is not to be believed as an accomplice of murderers, if there are circumstances to corroborate his evidence. It is not necessary that he should be corroborated in every particular, but if the general circumstances are confirmed, then the jury may believe him. Why not believe him? He was an associate of the conspirators. Is it not highly probable they placed confidence in him, and were willing to make him an agent in the murder? Is this not natural? But as soon as he says that he will not take a part in the murder, then he is a black and despicable character. Bad as he was, he was not up to murder, while they were. Has he been confirmed? If the jury believe his testimony they can have no doubt that the defendant is guilty. He says he was at the Crowninshields, and the two young men, Allen and F. Knapp, came there on white horses. Osborne confirms this. That Frank Knapp and George had a conversation of half an hour? Do they contradict this? They do not. They only say Palmer is not to be believed in anything. Mr. Osborne also says Frank Knapp hired a horse and chaise the same evening. Palmer says he came up there the same evening. The jury has a right to infer that when the two persons went away to ride, they went to Wenham to see J. Knapp, and to confer on the subject of the murder. The counsel may laugh as much as he pleases, but the story of Palmer is true. Then Palmer says, Richard told him the old man was to be at the farm on a particular day, and it would be a good time to meet and kill him. He was there on that

day in his wagon, as was proved by Mr. Lathrop. Here he was confirmed. They told him Mrs. Beckford was to be out of the way, and it is proved that she was out of the way. Then he referred to the letter from Belfast to J. J. Knapp, as proof that he knew all the circumstances of the conspiracy. How could he have known all this except through the medium which he now states? If Palmer is as black as his infernal majesty himself, take him at the worst, here is strong confirmation of the truth of his story, and he is to be believed. The inference is irresistible that the facts he states are true. If they are not true, why is it not proved they are not true? Why not prove that F. Knapp and Allen did not go up on white horses, etc. He stands uncontradicted in every particular—you cannot but believe him. Gentlemen, we wish not a multiplicity of victims, but every man concerned in such a horrid transaction ought to be brought to punishment. The gentleman says he has perfect confidence in the innocence of his client—he believes him as innocent as any of the audience. If he can with propriety say this, in your opinion, you will acquit the prisoner; if he cannot, you will do your duty. If you believe the testimony of Palmer to be confirmed, then there is no alternative but to convict the prisoner—and the irresistible inference is, that his story is true.

JUDGE PUTNAM inquired of the prisoner if he wished to add anything to what his Counsel had said. He replied that "he was entirely satisfied with the defense which had been already made."

JUDGE PUTNAM then charged the jury, who retired at a quarter before one o'clock.

THE VERDICT OF ACQUITTAL.

The jury came in at three o'clock, and the prisoner being placed in the bar, their verdict was received—which was *Not Guilty*.

Mr. Shillaber moved that the prisoner be discharged.

The Attorney General moved that he be arraigned on another indictment which had been found against him.

An indictment was then read by the Clerk, charging George Crowninshield with Misprison of Felony, or with having had knowledge of a conspiracy to murder Mr. White, and keeping it secret.

He pleaded *Not Guilty* to this indictment.

Mr. Hoar said that the indictment was founded on substantially the same charges as the former indictment, and must be supported by the same evidence. He therefore moved that the defendant be discharged on his own recognizance, and he hoped nothing more would be done about it, for he saw no reason why he should be compelled to go through this farce again, farce he must call it, for it did not deserve the dignified name of trial.

The *Attorney General* objected to this proposition. He said there was a material witness absent, and hoped the Court would grant a postponement of the trial. He stated the inconveniences of proceeding immediately.

Mr. Shillaber said they were willing to admit the testimony of Allen, as given at the trial of John F. Knapp.

Mr. Hoar proposed to prove that Allen was absent by the consent of the prosecuting officer of the Government.

The *Attorney General*. Not by my consent?

Mr. Hoar. Mr. Webster's.

Mr. Shillaber said that there had been no case of a trial in this country for the offense charged in this indictment: that it was only punishable by a fine.

The COURT said that evidence might be called to prove that Allen was absent by consent of Government.

N. West, Jr., was then called, Webster gave him permission to and testified that Mr. Allen, who go to sea, and that he had sailed was his clerk, told him that Mr. in the ship *George* for India.

The COURT then remarked that there was no reason why a longer postponement should be granted than to the 23rd instant, when criminal cases are to be tried, and ordered that the prisoner give bail for his appearance at that time in the sum of \$500, with one surety.

He was accordingly recognized, with his father for surety, and was forthwith discharged from arrest.

When Palmer was arrested and brought to jail he was placed in a cell directly over that of Richard Crowninshield, the hired assassin, who actually murdered Captain White. The knowledge of Palmer's arrest, and of Joseph Knapp's confession, and that a quantity of stolen goods had been found in his house reduced him to despair, and on the 15th of June he hung himself with his neckcloth to the grating of his cell.

Richard Crowninshield, though belonging to one of the first families of the County, was a desperate villain, as the contemporary biography of the murderer very clearly shows.

"The subject of this brief memoir was born in Liverpool, En-

gland, on the 14th day of September, 1804. His parents are highly respectable inhabitants of the town of Danvers, Essex County, Massachusetts, and were at the time of his birth then on a visit to some friends in different parts of Europe. Young Richard came to this country with his parents when about two years of age. Ever since his boyhood, he has been celebrated for his daring hypocrisy, coolness, defiance of all law, and a calculation and ingenuity that would have raised him to an eminence in the world, had he but received a proper education in infancy. Unfortunately, however, for himself and society at large, such was the peculiar situation in which he was placed in early life, and his naturally unruly disposition, which manifested itself almost in infancy, that before he had arrived at the age of eighteen, he had become the terror of all Essex county. Among his associates it is well known, he possessed almost unlimited influence. Indeed, no one dared dispute his authority. He was seldom known to yield to the wishes of any of his associates, and the coolness and precaution with which he invariably moved in his criminal pursuits, is truly surprising. As an instance of this we would state that on the very night the late murder was committed, Richard, it is said, complained of a slight indisposition, and went to bed, as seen by the family, about 9 o'clock in the evening. At 11 o'clock, two hours later, he again waked up some members of the family, and requested a preparation of medicine for the purpose of alleviating his indisposition. During the interval that elapsed between these events he had left his room privately, rode to Salem, perpetrated the bloody deed, and returned and placed himself in the same situation. It was about ten minutes after 10 o'clock that the murder of Capt. White was committed, according to the evidence of persons who saw him and Knapp skulking round the buildings. One female heard Knapp, it is supposed, say to the other, 'have you done it?' 'I have fixed him,' was the short and rapid reply. This story, incredible as it may seem, is true in every particular. The precaution taken by Richard, in complaining of indisposition, and taking medicine, although apparently trivial circumstances, would have formed very important facts, attested to by several witnesses, showing that he was innocent of the murder. To any jury it would have amounted to an alibi; and had the principal been arrested from the clutches of the law, by a concurrence of such testimony, it would have been quite easy to defeat the ends of justice as it respects the other associates.

"The voluntary confession of Knapp during his confinement, put out of joint all the plans of Richard, and drove him to the desperate alternative of suicide. This confession, as is well known, was made to Mr. Colman, of Salem, a clergyman of considerable piety and learning. Joe Knapp, as he is called, was not exactly counted as one of the confederacy, headed by Richard. He was extremely jealous of the personal popularity of Dick, among such men as Palmer, Hatch, Selman, Chase, etc. He always managed his criminal concerns on his own hook, and it was the necessity of the case

that alone made him apply to he leader of the gang for the execution of a plan, from which, through his connections, he vainly expected to reap the exclusive benefit. Joseph Knapp possesses, it is said, much vanity and superciliousness. His wife is considered one of the handsomest females in Essex county. After Joseph Knapp had made his confession, implicating Richard as the principal, the latter lost at once all hope of safety. Over all the rest of his associates he exercised unbounded sway, and it is most certain none of these would have dared to face him in a court of justice as a witness against him. The elder Knapp was beyond this influence, and hence his revelation. A short time before this, Richard dropped several hints in relation to Joe Knapp, which sufficiently mark his feelings towards that individual. 'I only wish,' said he, 'I was in reach of him one minute;' 'what would you do?' he was asked; he smiled with a singular and almost terrific expression of countenance and replied, 'not much, not much.'

"During the confinement of Richard, his cell was in the second story of the jail, under which, in separate cells, were confined one or more of his associates in crime. In the cell immediately under was the notorious convict, Palmer. When several individuals belonging to the Grand Jury or the Committee of Vigilance visited the latter for the purpose of finding out what facts he knew relative to the murder of Capt. White, they had taken the precaution, such was their knowledge of Richard's ingenuity and skill, to have every hole and crevice in the ceiling between the upper and lower cell well examined and filled up. We are told by the jailor that Richard himself was very famous in forming communications with the other cells adjoining his. By some means or other, he had got a suspicion that Palmer was confined in the cell under him, and forthwith he set himself to work in finding out the fact. The visitors of Palmer had not been long there before a noise was heard in the ceiling, like some person boring a hole; immediately something fell through; one of the gentlemen went and picked it up, it was a common lead pencil. In a short time a string came through with a small piece of paper attached to it. This was also examined. On it was written the single question, 'is your name Palmer?' One of the visitors present, who happened to be the chairman of the Committee of Vigilance, in order to see what Richard was at, desired Palmer to reply. Palmer declined, however. Some one then gave a slight pull of the string that dangled through the aperture. This had its effect. It was immediately pulled up. As a last resort, a low, deep whisper proceeded from the aperture, distinctly heard over the cell, 'Palmer, Palmer, Palmer, why don't you speak, Palmer?' We have, as it will be perceived, travelled somewhat out of our course, in introducing this part of Richard's history, and we shall therefore go back to his boyhood and state some remarkable traits in his character, and then follow him up to the day of his death.

"And first, we cannot but observe that the whole career of Richard was of the most extraordinary character. New England has rarely

produced his equal. Born of respectable and wealthy parents, he had every opportunity of becoming an ornament and blessing to his country. Had he but taken half the trouble to render himself useful and happy, that he did to give himself a disgraceful character, he would ere now have been one of the most distinguished men of which our country boasts. Bulwer's last hero, Paul Clifford, resembles Richard in very many particulars. They were both of them cool, calculating, daring, desperate villains, and possessed of energy of mind and resources of the most wonderful kind. No better proof of this fact relative to Richard can be given than the late diabolical assassination. Indeed, the whole history of the confederacy for plunder, robbery and murder is one of the most singular that ever took place in the civilized world.

"When about ten years of age, young Richard was sent to a public grammar school in Danvers. He had not been there but a few months, before he was discharged by the instructor as an unruly and mischievous boy. This so enraged our hero that he told some of his school fellows that if they would assist him he would set the schoolhouse on fire, the first good opportunity that presented itself. One of the boys in the secret became frightened at the result of the undertaking and gave information of the plot to the instructor, and thus prevented the design from being put into execution. Soon after this occurrence, young Richard was sent to an academy in New Hampshire to complete his studies previous to his being entered as a candidate for admission to Harvard University. Here he remained about three years and a half, during which time scarcely a day passed but he was reprimanded for some impropriety."

Richard was finally expelled from the school, but instead of going home he hung around the neighborhood for some time, robbing hen roosts and destroying property whenever he could.

"His father, on hearing of his dismissal from school, immediately sent for him to return to Danvers, and offered him the situation of underclerk in the extensive factory situated in that town, of which he was at that time a very large proprietor. Dick, however, refused to return, unless his father would give him a regular annual salary, and suffer him to reside wherever he pleased. This unreasonable request his father very properly refused to grant. At length, Dick having positively declared he would not return until his request was complied with, his father was compelled to leave his business, post off to New Hampshire, and bring his refractory son along with him to his home. Behold him, then, again a resident of the peaceable and quiet town of Danvers; a town which, in after years, he was to render so noted for his remarkable and daring exploits. He had scarcely been at home a month, ere he once more commenced his old career of devilry."

He became the leader of a gang of young desperadoes who had their rendezvous in a cave in the country, and who committed a number of robberies. He finally seduced a neighbor's daughter and had to leave the State. He went to New York and from there

to Charleston, S. C., where the standing of his family and the introductions which he was able to obtain gave him the entry to the best society of that place, and he finally became engaged to the daughter of a wealthy Southern planter. But the father's inquiries at his home revealed his true character and he was forbidden to enter the house again. He came back home, but only to take up again his former career of vice and crime.

"He and his associates now established a gambling house at the South Fields, for the purpose of more effectually carrying on his old career of iniquity and sin. It was their daily practice to entice young men into this moral pesthouse, and after getting them a little intoxicated, defraud them of their money. We have been told by those who have frequented the place, that money to an almost incredible amount has here been lost and won. It is said one of the students now at Harvard University lost in one night over three hundred dollars. Many, very many of our youth, can here date the foundation of their ruin. Within the walls of this modern 'Hell,' it is known the cold-blooded murder of Capt. White was proposed and agreed on by the Knapps and their confederates. It is a place where sharpers, cut-throats, and harlots used to assemble from Salem, Lynn, Danvers, and adjoining towns, and hold their secret meetings. No one was admitted but such as were supposed to have money and were fond of play.

"A few weeks previous to the late murder, Richard seemed uncommonly low-spirited and sad. His slumbers were broken and uneasy. In the night he would oftentimes start from his bed and by his cries disturb the whole neighborhood. He had at this time consented to perform the bloody tragedy, and that worm which never dies was gnawing into his very vitals. As the time drew near in which it was coolly arranged the gray-headed old man should be slaughtered, Dick was observed unusually busy in his workshop. On being asked the reason, he said that his health was feeble, and he was advised by the physicians to give himself more exercise. On the night of the murder, as we have before remarked, Dick complained of indisposition, and retired early to bed. He arose just before ten, left his father's house, and proceeded to the dwelling of Mr. White. He entered and accomplished his bloody work. What more remains for us to add? The fiend has since robbed justice of its victim, and gone prematurely to his account. His judge is the Omnipotent God, who deals with his creatures as seemeth to him best.

"If the eventful life of the misguided young man, whose dark career we have here portrayed, has been that of the man of the world, who is there in future will aspire to such a title! How quick is the transit of such persons! How short their day of pleasure! For a moment they glitter, and then sink into endless oblivion. In the long living annals of infamy, their names will stand recorded in all coming time.

"Our hero, towards the latter part of his life, had but few friends.

He might, however, have had many. His transient morning might have been the dawn of a brighter day. His name might have been enrolled high on the book of fame, and his memory have left a sweet fragrance behind it, grateful to his surviving friends and connections, and most salutary to the rising generation. With what capacity was he endowed! With what advantage of becoming everything that is excellent and good. Like others, however, who have gone before him and followed in the same crooked path, his downward course was dark and rapid. With an opportunity of benefiting mankind, he chose rather to curse it. With talents of an angel, he became a devil."¹⁰

The following two letters were left by Richard Crowninshield, Jr., in his cell, on the day he committed suicide by hanging himself:

SALEM, June 15th, 1830.

"Dear Father,

These are the last lines from your undutiful son, that has disregarded your chaste, moral precepts, that was always bountifully bestowed on the unfortunate being that will ere you receive this, cease to exist, my last request is that you will have my body decently bury'd, and have it protected from the dissecting knife, and may the blessing of God, rest upon you.

"Farewell.

"Richard Crowninshield, Jr."

Superscribed:

"To

Rich'd Crowinshield, Esq.,
Danvers, Mass."

SALEM, June 15, 1830..

"Dear Brother,

"May God; and your innocence guide you safe through this Trial. Had I taken your advice, I would still enjoy Life, Liberty, and a clear conscience. But I have not, and perceive my case to be hopeless, therefore I have come to the determination to deprive them of the pleasure of beholding me publicly executed, as after I am condemned they will not give me the opportunity, and may God forgive me. George this is an awful warning, to you, and I hope it will be the means of reforming many, to virtue. Albeit, they may meet with success at the commencement of vice, it is short lived, and sooner or later if they persist in it, they will meet with a similar fate to mine. Oh! George forgive me for what I have caused you and others to suffer on my account, and my last Benediction rests upon you. A long, a last adieu.

"Rich'd Crowninshield, Jun."

¹⁰ "A Biographical Sketch of the Celebrated Salem Murderer," etc., *ante*, p. 405.

The following lines were also found on a separate paper in his cell. They probably refer to the Committee of Vigilance, and others who took an active part in unearthing the murderers:

"To * * * * *

Ungrateful wretches; why do ye crave?
The life our heavenly maker gave
Why confine us in the gloomy cells?
Where nothing save grief and sorrow dwells,
Detested Fiends; be banished hence,
Among your Kindred go best your sense,
Where imps of Hell, and Devils rome,
Go and seek out your native home."

THE TRIAL OF JOHN BALL FOR SETTING FIRE TO HIS OWN HOUSE, NEW YORK CITY, 1817.

THE NARRATIVE.

John Ball was a man of wealth, who owned much property both in lands and houses in the city of New York where he lived. For many years he was a sober, industrious and most respectable citizen, but in his old age he unfortunately took to strong drink. Then he abused his wife and became so bad a husband that a separation was necessary, and he was ordered by the Court to pay her a yearly allowance for her support. After this he lived in two rooms in one of his houses, the rest of it being rented to two families named Tallman and Rashore. But he made no effort to reform; he was often intoxicated and when in that condition very abusive and notwithstanding his wealth he was frequently arrested and sent to prison for public drunkenness and breaches of the peace.

Next door to Ball lived a Mr. Matthews, who had been a friend of Ball in the old days and who, when the trouble with the wife came on, championed her cause and had been appointed by the Judge the trustee in the articles of separation. For this he had gained Ball's enmity and the latter frequently made threats against him. One night in May, Ball came home very drunk and was reprimanded by Mrs. Tallman, who met him in the hall. He turned on her, said he was going to kill her, but she got away and into the Matthews house next door. Matthews went back with her to try to make peace, but it came to nothing, for Ball now included his neighbor in his murderous threats, and the latter was glad to escape from the house without injury. About midnight Matthews was awakened by an alarm of fire, and soon discovered that it was in Ball's house. When he reached there the neighbors and watchmen had extinguished the

flames which were in one of Ball's rooms on the third floor and in the bedroom below they found Ball lying on the bed, bathed in blood and a razor at his side. He acted like a madman, tried to tear open his wounds and declared that if he had had a little more time he would have accomplished his revenge.

Ball recovered and was indicted not for arson but for maliciously burning down his own house, the malice consisting in his intention that the fire should spread to Matthews' house. And he was convicted of this by the jury.

THE TRIAL.¹

In the Court of General Sessions, New York City, June, 1817.
HON. JACOB RADCLIFF,² Mayor.

June 15.

John Ball had been indicted by the Grand Jury for a misdemeanor³ in wilfully and maliciously setting fire to a dwelling house in the City of New York, on May 31st, last. The house was situated at No. 3 Moore street, and was owned by the said Ball. He pleaded *not guilty*.

*Hugh Maxwell*⁴ for the People; *Dr. Graham*⁵ and *William M. Price*⁶ for the Prisoner.

THE EVIDENCE.

William Matthews. I own the many houses in the city and is house next door to 3 Moore street, reputed to be very wealthy. and live there. The house next Since his separation from his door is owned by the prisoner. wife, he has roomed in the house I know him well; he owns a great next door. William Tallman and

¹ New York City Hall Recorder. See 1 Am. St. Tr. 61.

² See 1 Am. St. Tr., 61, 361, 671, 717.

³ The New York statute on the subject of arson declared (1 R. L., p. 407): "Every person who shall hereafter be duly convicted of wilfully burning any inhabited dwelling house shall suffer death for the same." Ball was not indicted under this statute.

⁴ See 1 Am. St. Tr., 62, 362, 675, 718.

⁵ See 4 Am. St. Tr. 854; 5 *Id.*, 711.

⁶ See 5 Am. St. Tr., 787.

John Rashore occupy the rest of the house as his tenants. Prisoner is about sixty years of age. For a number of years he has been addicted to drink and his conduct was so bad and his abuse while intoxicated so great that his wife was forced to leave him. He was arrested several times for drunkenness and for abusing her. I had been a friend of the family and I did all I could to mend matters. A separation was finally decided on and Ball executed while he was in jail a paper of separation allowing his wife a separate income. After this he thought me his enemy because I had befriended his wife; he frequently threatened me, especially when he was drunk. On the evening of the fire Mrs. Tallman, the wife of one of his tenants in the house next door to mine, ran into the house very excited, crying out that Ball was going to kill her. As I was trustee in the articles of separation she thought I had some control over him; so I went over with her but Ball at once commenced to abuse me and when I said he would have to be locked up again I thought for others' safety, he got very angry and I thought it best to retire. The alarm of fire came a little later and when I hurried back the second time I found a room on the third story on fire. When we got the fire out we went to Ball's room on the second floor. The door was locked. We could get no reply, so we forced open the door. Found Ball lying on the bed; he was bleeding and there was a razor on the bed beside him; we discovered that he had cut his throat, but not very badly. Never thought he was insane.

Mrs. Tallman. Am the wife of William Tallman; we rent part of Mr. Ball's house; Mr. Rashore has the rest of the house except two rooms, one on the second and one on the third which Mr. Ball occupies. He sleeps on the second floor. He was hard to get along with, often drunk and then very abusive. Never thought him insane, but he was very bad tempered. The night of 31st May last, he was intoxicated when I met him in the hall; he swore at me and when I said I would call the constable he said he would kill me then at once and be done with it. I ran over to Mr. Matthews and got him to come back with me and protect me, as my husband was away, and so was Mr. Rashore. But he talked to Mr. Matthews as he did to me. Mr. Matthews left and I locked myself in my bedroom. Heard prisoner moving about and peeping out of my door saw him go up in his stocking feet to his third floor room. He came down after a little and went out on the street. I looked from my window and saw him looking up at the third story or the roof of our house; he came in and went back to his bedroom; thought he had gone to sleep as everything was quiet, but near midnight I smelled smoke and going out into the hall found it came from the third floor. Went up there; Ball's room there was on fire; gave the alarm; people rushed in and the watchmen and they soon put it out; after that Mr. Matthews said we must find Ball; someone knocked on the door, but nobody answered. Someone broke the lock and there was the prisoner on the bed, all bloody; he acted like a madman; tried to tear open his

wound and declared two or three times that if he had half an hour longer he would have had his revenge. He always kept the keys to his rooms; never knew him have a fire in the third floor room.

Several witnesses testified that Ball had, formerly, been a sober, industrious man, in this city; but

that for a number of years past he had been in habits of brutal intoxication, and was of violent, vindictive passions. The day, however, when the fire took place, he was more sober than usual; other witnesses, on behalf of the prosecution, concurred that he was not subject to insanity.

Mr. Maxwell told the jury that the indictment was framed, at common law, for a misdemeanor, because the house belonged to the prisoner.

The Court observed that the words of our statute were very broad, and sufficient to include a crime of this description; but whether the offense with which the defendant was charged came within the statute, he need not decide.

Mr. Price contended that the indictment was not supportable, because it was not alleged therein that the defendant set fire to his own house with an intention of setting fire to the house of another. He also contended that the fact of setting fire had not been proved against the defendant. And should the jury believe that he did commit the act, the other circumstances in the case, independent of any proof, were sufficient to convince the most incredulous that the defendant was, at the time, subject to insanity.

The MAYOR stated to the jury, in his charge, that the question whether this offense came within the statute was not submitted for determination. For a man to set fire to his own house, in a populous city, was a very dangerous offense; and it had long been settled that this was a misdemeanor at common law.

The circumstances in the case left no room to doubt of the fact. He charged the jury that if they believed that the defendant, actuated by revenge, or through despair, committed this act, it would be their duty to find him guilty. It did not necessarily follow, as had been contended on behalf of the defendant, that the act of which he had been charged was the result of insanity, because, from its nature, it was horrid

and unnatural. The only question on this part of the case is, whether at the time he committed the offense he was capable of distinguishing good from evil.

The Jury returned a verdict of guilty, and the prisoner was sentenced to pay a fine of \$250.00, and to give security for his good behavior for two years in the sum of \$6,000.

THE TRIAL OF WILLIAM DUANE, JAMES REYNOLDS, ROBERT MOORE, AND SAMUEL CUMING FOR RIOT, PHILADELPHIA, PENNSYLVANIA, 1799.

THE NARRATIVE.

One Sunday morning in the last year of the eighteenth century four citizens of Philadelphia—William Duane,¹ the editor of the *Aurora*, a leading newspaper of the day; Doctor

¹ DUANE, WILLIAM. (1760-1835.) Born, Lake Champlain, N. Y., where his parents, natives of Ireland, had settled. His father dying shortly after his birth, his mother when he was seven years old removed with him to Philadelphia and two years later returned to her old home in Ireland. The family was in easy circumstances and William was allowed to choose what vocation he pleased. At nineteen, he deeply offended his mother by marrying a Protestant, who refused to speak to him again. He learned the printing trade and in 1784 emigrated to India, where he established a newspaper and amassed a fortune. But his attacks on the Government resulted in the confiscation of his property and his expulsion from India. Returning to England, he founded the "General Advertiser," which later became the "Times," the greatest of English newspapers. In 1795 he left England and settled in Philadelphia and became connected with the "Aurora," edited by Benjamin Franklin Bache, and on his death in 1798 he became its editor. In the War of 1812 he was appointed adjutant general for the division embracing Pennsylvania. Mr. Duane warmly advocated the independence of the Spanish Colonies in North and South America, for which the Congress of Colombia paid him a formal vote of thanks. This led several creditors of that government, residing in the United States, to consider him a suitable person to present their claims before the government of that country. Mr. Duane accordingly disposed of the "Aurora" in 1822, and went to South America. His visit to Colombia was unsuccessful as far as the interests of his principals were concerned, but he published an amusing and instructive volume of his travels. On his return, he was an alderman of Philadelphia, and the Prothonotary of the Supreme Court of Pennsylvania for the Eastern District, in Philadelphia. His writings, in addition to his papers, as the editor of a daily newspaper, comprise works on education, history, military science, politics and political economy.

Reynolds, Robert Moore, Esq., and Samuel Cuming, a printer—were marched through the streets of the city, taken before Mayor Wharton,² and charged with riot, the scene of which was the Roman Catholic Church of St. Mary, on Fourth street. It appeared that during divine service that morning some of them stuck up placards on the walls containing the following announcement:

The natives of Ireland who worship at this church are requested to remain in the yard after divine service until they have affixed their names to a memorial for the repeal of the Alien Bill.³

² WHARTON, ROBERT. (1757-1834.) Born and died, Philadelphia. He was captain of the first troops of Philadelphia Cavalry and was thirteen times elected Mayor of his native city.

³ This statute (passed in July, 1798) which was entitled, "An act against alien enemies," in its first section required, in case of war between the United States and any foreign power, that all citizens of such country over fourteen years of age should be declared liable to be apprehended, restrained, secured and removed as alien enemies. The President was by proclamation to direct how such aliens should be treated, the restraint to which they should be subject, which of them should be permitted to remain in the country, and which should be expelled. It provided that such alien enemies resident within the United States who should not be chargeable with actual hostility or other crime against the public safety, should be allowed for the recovery, disposal and removal of their goods and effects, and for their departure, the full time which is or shall be stipulated by any treaty, where any shall have been between the United States, and the hostile nation or government, of which they shall be citizens or subjects; and where no such treaty shall have existed, the President of the United States should ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

Section 2 enacted that after the President's proclamation it should be the duty of the Courts of the United States, and of each State, having criminal jurisdiction, upon complaint against any alien or alien enemies as aforesaid, who shall be resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President of the United States shall and may establish in the premises, to cause such alien or aliens, to be apprehended, and after a full examination and hearing on such complaint, and sufficient cause therefor appearing, should order such alien or aliens to be removed out of the territory of the United States, or to give sureties of their good behavior, or to be otherwise restrained conformably to the proclamation.

Some of the trustees and some of the congregation pulled down these placards; they were stuck up again and again pulled down. The priest, when informed of the matter, directed that the congregation should be apprised in order that they should be prepared if a riot and disturbance should result. When the people came out there was a man on a tombstone haranguing the crowd, some of whom had already signed the paper. The orator and his group were dispersed, but not before Dr. Reynolds had drawn a pistol on one of the officials and had been knocked down. The four were committed for trial and when that came on the leaders of the Pennsylvania bar appeared on either side, for it was a political prosecution from the start. And as such trials usually end, all four were acquitted by the jury.

THE TRIAL.^{3a}

In the Court of Oyer and Terminer, Philadelphia, Pennsylvania, February, 1799.

HON. J. D. COXE, *Presiding Judge.*

HON. R. KEEN,

HON. JONATHAN B. SMITH,⁴

HON. A. ROBINSON,

} *Associates.*

February 21.

The Defendants—*William Duane, Esq.*, Editor of the *Aurora*; *James Reynolds, M. D.*, *Robert Moore, Esq.*, and *Samuel Cuming*, printer—had been previously indicted by the Grand Jury for riot. They had pleaded *not guilty* and had been severally held to bail for their appearance today.

Joseph Hopkinson,⁵ for the Commonwealth.

Andrew J. Dallas,⁶ *Messrs. Dunkin and Beckley*, for the Defendants.

^{3a} *Bibliography.* **Wharton's State Trials.*" See 4 Am. St. Rep. 616.

⁴ SMITH, JONATHAN BAYARD. (1742-1812.) Born Philadelphia. Delegate to Continental Congress and a signer of the articles of Confederation. Died in Philadelphia.

⁵ HOPKINSON, JOSEPH. (1770-1842.) Born Philadelphia. Graduated Univ. of Penn. 1786. Began practice of law Easton, Pa.,

Mr. Dallas, having examined the indictments, submitted that the name of the prosecutor was not on the back, as customary.

Mr. Hopkinson said there was no personal prosecutor; the State was prosecutor; he had privately stated the same thing to *Mr. Dallas* before, and he was surprised the same question should now be asked of the Court. He then read the charges as they had been transmitted from the Mayor's office, and said from the evidence that had appeared before that magistrate, that it had been deemed proper to institute the two separate charges.

Mr. Dallas. The gentleman need not be at all surprised, that upon a matter of public investigation, I should make a distinction between what was a fact, and what ought to be the legal form of proceeding; I certainly had received the information mentioned, but I did not conceive myself bound thereby to conclude the fact was therefore just and proper. On the contrary, when I saw that there was no real or substantial ground for discrimination, either from the information received, or from the evidence that had been given at the Mayor's office; when I knew that *James Gallagher, Jr.*, was the person implicated, as the person supposed to be assaulted, and whose life is alleged to have been endangered by a riotous meeting, he thought where that charge was separated, the accuser should also be separated; it was under these impressions that I could not waive a public duty, however respectable the author of the private information, which, besides, was of a nature that could be considered as confidential. The indictment I could not consider as drawn up in the Attorney General's office, but at the instigation of *Mr. Gallagher*, a young man of impetuous passions, and acting under their immediate influence.

The COURT. Were the bills drawn up in the Attorney General's office?

Mr. Hopkinson. No; they were not.

The COURT. As the Grand Jury has returned two indictments, the Court has no control over them; they must be tried in course. With respect to the second indictment, the defendant would certainly have a right to demand the name of the prosecutor, were there not a decision upon the law of assembly which establishes, that when the Attorney General shall declare the prosecution to be ordered by the public, no prosecutor need be named. The gentleman employed on

1791. Representative in the 14th and 15th Congresses. United States District Judge, Eastern Dist. Pa., 1828-1842; member Constitutional Convention, 1839; president Academy of Fine Arts; vice-president Am. Philosophical Soc.; trustee Univ. of Pa. Author of "Hail Columbia." Died in Philadelphia.

* DALLAS, ANDREW J. (1759-1817.) Born in Jamaica and sent to Europe to be educated. On his father's death in 1781, he returned to Jamaica and in 1783 removed to Philadelphia and became an American citizen, and was admitted to the bar. Became Secretary of State of Pa. in 1796, United States District Attorney in 1801, and Secretary of the Treasury in 1808. Died in Trenton, N. J.

behalf of the State, declares upon a return, there is no prosecutor actually employed; under these circumstances the Court are unanimously of opinion that none need be endorsed.

The Jury were then called over, and severally impanelled as follows: J. Rinck, Thomas Tompkins, Henry Leech, Henry Hoffner, George Greble, John Sowder, Daniel Shittle, Daniel Zellar, William Etris, Jacob Walter, John Hastang, Michael Maley.

MR. HOPKINSON'S OPENING.

Mr. Hopkinson said he acted as prosecutor in the name of the Commonwealth, and in the place of the Attorney-General. In the discharge of this duty he should not engross much of the time of the Court and jury, as he would confess that he had but a very limited knowledge of the circumstances of the case. The evidence, however, was ample, and rather than risk the probability of leading the minds of the jury wrong, he should rely upon that evidence, and they would apply it in such a manner as justice required according to their best understanding.

There were two bills, presented to the Grand Jury, one of them against William Duane, James Reynolds, Robert Moore, and Samuel Cuming, for a riot and assault; there was a second count in the same indictment found on that bill, for riot only. The second indictment was against James Reynolds alone, for an assault upon James Gallagher, Jr., with an intent to kill. Having read the indictments, he observed that they were laid in the common form of indictments for riot and assault, and the second indictment was founded on the more aggravating conduct of Dr. Reynolds, compared with that of his colleagues. The jury would therefore endeavor, in receiving the testimony of witnesses, to discriminate between the two charges exhibited, the one against the whole, and the other against an individual. It was only necessary further to state to the jury, that the time when this affair took place was on Sunday, the 9th of February, in the yard of the Catholic Church of St. Mary.

The counsel for the defendants remark that the separation of this case into two indictments was a very extraordinary proceeding; to which reply was made, that it was only or-

dinary. It was asked if the defendants would be tried on the two indictments by the same separate juries. Their counsel observed that it was immaterial; the mode which gave least trouble to the Court would be best. They would be tried together and by one jury:

THE WITNESSES FOR THE PROSECUTION.

John Brown. Went to St. Mary's Church last Sunday was a week, at about half past nine; had not been there but a few minutes before Dr. Reynolds and Mr. Cuming stepped up to the gate where I was standing. Dr. R. had four small notices in his hands, two of which he gave to Mr. C. to put up on the doors in the yard of the church; Dr. R. put up one on each gate; when he had put up the first, I went and read it; before I had done reading it, the clerk of the church came up where I was standing reading it; I showed it to him; told him it was a pretty thing to be upon the gates and doors of the church; he immediately pulled them both off the gates. As I was going into the yard, met Mr. John O'Hara, one of the trustees; told him of it; he went up with me into the yard, and he pulled the two off the church doors; then went into church. Dr. Reynolds nor Mr. Cuming said nothing when the clerk pulled down the notices, though they were both passing by at the time. They went away out of the yard. About ten minutes before service was over, I got up from my place and went to the window; I saw Dr. Reynolds, Mr. Moore, Mr. Duane and Mr. Cuming standing at the tombstone of the late Rev. James Burns, talking together. Mr. Moore and Mr. Duane, each of them, had a large

paper spread on the tombstone before them; one at the west end and the other at the east end of the tomb. I then returned to my place. Did not get down from my place in the upper gallery till after the congregation were gone out, and I saw nothing more. The notice that was posted up read: Natives of Ireland who worship at this church are requested to remain in the yard after divine service until they have affixed their signatures to a memorial for the repeal of the Alien Bill. Did not at any time say to any of these gentlemen that they were doing wrong. Heard no noise during the service, nor any disturbance or interruption of the service. Am clear the clerk saw Dr. Reynolds and Mr. Cuming, and that no violent or improper language was made use of.

John Connor. The circumstances that took place before church I am totally ignorant of; came there rather late. As I went into the church I perceived on the door one of these notices, which I read, and went into the church. During the service Mr. Gallagher, Jr., was going round the church to different gentlemen of the congregation, to their pews. He came to the pew where I sat, after he had intimated to me that it would be desirable I should stay, and that there was to be a seditious meeting after

prayers were over. In consequence, I went out of church rather before prayers were over, with a view of staying to see the end of it; when I got near the vestry room perceived Dr. Reynolds; he had in his hands a large paper. At this time there were a number of persons round him. Do not know whether they were of the congregation or not. I asked what the purport or intent of that paper was; he replied it was a remonstrance to Congress praying for a repeal of the Alien and Sedition bills, or to that effect. Said I conceived it was a very improper thing, both as to time and place. He observed that the emergency of the thing was such that it could not be avoided, as the subject was to be taken up in Congress the following day. I said I believed it was viewed by the congregation generally as an insult offered to their church. He replied he would defend himself against any insult. By this time a number of the congregation were coming into the yard; that particular part of the yard became very much crowded; an altercation took place between a number of them, apparently addressing themselves to Dr. R.—I suppose to the same effect as what I had—on which a loud cry of turn him out was heard, on which I saw Mr. Gallagher, with his hands extended, with a view, I supposed, to turn Dr. R. out. Do not know from whom the cry proceeded; at this time Dr. R. put a pistol to the body of Mr. Gallagher; a great commotion took place at this moment; the cry was by several that he had a pistol in his hand. I made an effort to lay hold, but did not succeed; there was such a con-

course of people I was shoved away. Finding the matter serious, I immediately went to the office of the Mayor, with a view of having the peace commanded; did not see the Mayor, and brought no officer with me. When I returned there were still a number of persons there. Perceived a concourse of people going down Shippen street or Prune street, with two or three constables; went down Prune street and saw the constables on the steps of a house belonging to Dr. Shippen (where Dr. Reynolds lodged). Dr. R. came to the door; they took him from that house to the Mayor's office, where we waited a considerable time before the Mayor came in, after which we were all examined. Before I saw Dr. Reynolds draw his pistol I saw Mr. G.'s hands extended. Am not positive as to his touching him. Saw the bill posted up, but did not see or hear anything to disturb divine worship. No indication of riot by noise at this time. Did not see Mr. Reynolds produce a pistol before the cry of turn him out. Dr. Reynolds declared that he would not suffer himself to be insulted before this cry of turn him out. There were many persons at that time around Dr. Reynolds; several of the congregation considered the presentation of that memorial for signatures as an insult. After my return the people were much inflamed; was apprehensive of violence from Dr. Reynolds or from the congregation. Did not see Dr. Reynolds thrown down, though I am sure he was down. Saw Mr. Moore shortly after I came up from the Mayor's office; he did not seem boisterous. Did not see Mr. Moore engaged in any riotous act. Did

not see Mr. Duane or Mr. Cuming that day until I saw them at the Mayor's office.

James Gallagher. When entering the south door of the church of St. Mary's Sunday before last, observed an advertisement calling on all the natives of Ireland to remain, etc., and to affix their names to a memorial against the Alien and Sedition Bills. Am positive both were mentioned; tore it down, when I was accosted by a person who, while in the Mayor's office, called himself James Cuming; asked me how I dare tear that paper down; called me an impertinent scoundrel. It was posted, not on the door, but on the wall beside the door. Cuming said I was an impertinent scoundrel for tearing it down. Told him that no Jacobin paper had a right to a place on the walls of that church. He was immediately after joined by several others. Mr. Moore, Mr. Duane or Dr. Reynolds were not among them; I did not see them; saw Mr. Duane for the first time that day at the Mayor's office. The persons that were there perhaps belonged to the church; they gave me much abuse, and threatened me for insulting their nation; they did not mention what nation, but said if it was not the Sabbath they would punish me for insulting their nation. The advertisement was soon afterwards replaced by Cuming, and appeared to be the same. I then walked down to the corner of the church, and met Mr. John Taggart, and told him of these things; he told me it was very improper conduct, and he tore down the second bill. I then went into the church and informed the Rev. Mr. Neale of what had passed; begged him to

endeavor to prevent it, for if a meeting took place in that yard there certainly would be rioting, and perhaps bloodshed. He said he did not know how to act; that he had two of those bills before that had been torn down by the clerk; that if he had known it when he was in the pulpit he could certainly have forbid it. After some reflection he desired me to go and inform some of the influential members of the church of it, in his name, and prevent it. Went to my father's pew, who asked my reason for it, and I told him; he desired me to take some men out of the church and turn them out; told him I had been out of the church and saw no persons there. He is one of the trustees of the church. Waited till service was over, and went out at the west door, and saw a number of persons with papers at Mr. Burns' tomb; but they were quiet. Went to the tombstone of my mother to prevent any riot taking place there; saw a crowd at the southeast corner; when I got near heard a person declaring he would not be forced or pushed out of the yard, and the cry of turn him out. Got into the crowd, when I saw Dr. R. keeping four or five persons at bay; I went forward in order to turn Dr. Reynolds out of the church yard, as I felt myself hurt by the injury and insult done to my religion, making that a place for political meetings; and more so because I did not observe a single Catholic among them. Before I had time to catch hold of Dr. R., he presented a pistol to my breast; had my hands raised with a view to put him out; he declared he would shoot any man that would lay hold of him! I struck at him;

he wheeled. Don't know whether I struck him or not, and the pistol hand fell by his groin, when Mr. Lewis Ryan took hold of him, threw him down and took the pistol from him; I kicked him twice or three times while he was down; do not know whether he took the pistol out of his pocket or not. Then went to the Mayor, in order to have him apprehended. He was not at home; returned, but did not see Dr. R. till he came out of Dr. Shippen's with the constable. Saw Mr. Moore at the time he was ordered to go out of the churchyard. He said he would go with pleasure. He answered the same when he was ordered to go to the Mayor's. Did not see Mr. Duane at all there; nor did I see Mr. Moore behave in a riotous manner, or exceptionable at all. There was not a word of conversation between me and Dr. R. till at the cross-examination at the Mayor's. Did not see them together; Dr. R. was very active. Mr. Taggart was close by during the transactions.

Mr. Dallas. Mr. Gallagher, you seem to have just ideas of your religion; I wish to know something of your politics; when you called the memorial a Jacobin paper, and the meeting of four persons to receive subscriptions to it a Jacobin meeting, do you call petitioning for a redress of grievances Jacobinism? A. It was indifferent to me what were the contents of the paper; it had no business there.

Rev. Leonard Neale. On Sunday before last, the 9th of this month, I repaired to the church to preach; after the commencement of divine service, when I got into the sacristy, I met with two notes or advertisements, on

the table, which the clerk told me he had pulled down, in conformity to an order I had given him respecting all publications whatever, unless they were authorized by me. Immediately prepared myself and went to the pulpit. Having finished my sermon, I returned to the sacristy, where, after taking off my surplice, was accosted by Mr. James Gallagher, Jr., who stated to me that advertisements had been fixed upon the church wall, and at different places about the church, and that he was apprehensive, from the way they were put up, guarded or protected by the people that put them up, there might be some disturbance. Considered myself applied to, in my official character, both as superior of the church, and president of the board of trustees. Replied I had two of the notices that the clerk had pulled down; that I deemed the affixing those notices on the church as an insult to me and the board of trustees, who had the care of the church; because, according to the usage of the church, no notice or advertisement should be put up without my positive consent. Not being able to speak to the trustees, upon a short recollection, desired Mr. Gallagher to go to some of the principal gentlemen of the congregation, and inform them from me, as worship was going on and I could not speak to them, that those advertisements were fixed up without my approbation, and that any meeting whatever after the church was over I deemed to be perfectly wrong, and I should never suffer it; and if I had known of it before sermon I should forbid it from the pulpit. I requested some of the leading members of

the congregation to step forward immediately after service into the yard and by their influence prevent any disturbance or meeting whatever; after which I took my cloak and went round the church outside. My object was to see if there were any more papers affixed on the church; and, if possible, to meet with the gentlemen who put them up, and request them to retire from the place. Saw none of them, or anybody else. Returned and went home, expecting they had dropped their design of having a meeting in the church yard. There were no persons in the church yard when I came out of the church. Saw neither men nor any paper. Divine service was not over, as they stayed at the altar. Divine worship was not at all disturbed, except by the young man going out at my request, and entirely at my direction.

Rev. Mr. Carr. Respecting the transaction which took place, I had no knowledge of it, or consultation, nor any hint of such a transaction taking place.

Mr. Dallas. You superintended a church in Ireland, did you not? Was it, or not, customary in Ireland, after the congregation were out of church, to attend to any particular public business? I have known it many times; it is frequent in the country, and I knew it once occur in Dublin; meetings of this kind are appointed frequently in Ireland, after retiring from church. Papers are frequently brought for the people to sign, and it was never considered any profanation of the church, or insult to the congregation; otherwise it would not be allowed. One instrument in particular was called the Catholic Declaration, intend-

ed to obtain a repeal of some severities on the Catholics. On another occasion, it was done respecting the Militia law.

Mr. Dallas. Did you ever know anything of the kind except where it particularly respected Catholics? No, I believe not, though the militia law was very much, and very generally disliked. Whenever those things are done, they are done by the pastors; they are always consulted on it. It is not unusual to post up notices or advertisements on the church gates in Ireland? In the capital it is not common, but in the country it is very common. But matters of great public importance are generally given from the pulpit.

Lewis Ryan. Going to church on the Sunday before last, I made no stop at the church door, but went right in, as I supposed myself rather late. The first thing during service which took my attention, was James Gallagher, Jr., coming up from the sacristy, and going into the pew of Mr. George Meade, and whispering to him, and to some others, which occasioned me to take notice of his coming from that door in the time of devotion, and whispering; this took my attention, because if anything was wanting, it was the business of the clerk to communicate it. That made me look round, and I expected some disturbance was going forward, but I saw none at that time. Going out from the church, between the sacristy door and the gate, there seemed a crowd; the first person I observed in the crowd, much agitated with the business, was old Mr. Conroy; seeing the old gentleman so much concerned in the business, occasioned me to stop, knowing him

to be always a regular, orderly man, and a man whom I knew to belong to the church. In stopping to look at what was going forward in the crowd, saw a gentleman dressed in black clothes, that appeared strangely to me. Mr. Conroy was wanting him to go out of the yard; did not know who it was, but I found in the mayor's office that it was Dr. Reynolds, the person I took the pistol from afterwards; did not distinctly hear the conversation that was going forward; went near, when Thaddy McCarney came up to this gentleman who was thus engaged, telling him he was a gentleman, and he wished him to go away peaceably; at this time James Gallagher, Jr., stepped forward; he held up one or both hands; he appeared to me to give him a push, not that I supposed he received any injury, but only as though he wished him to go. At this time the gentleman stepped a little back and put his right hand into his pocket; it appeared to me that this was after he received the push—this is, to the best of my knowledge. He then pulled out a pistol and presented it towards the body of J. Gallagher, Jr., which part of the body I could not expressly say; supposed the person who pulled out the pistol to be insulting the congregation by some means or other, but I did not know how. Was very desirous to prevent any damage being done to any person coming out of the church; felt very much alarmed at the sight of fire-arms, and did not know how to act in the business, for it was difficult to engage with a man having fire-arms. This gentleman then stepped a little backwards, his right side coming

towards me; but in the motion, the point of the pistol appeared to fall as low as the groin or thigh of J. Gallagher, Jr.; made a grasp at the pistol, and got hold of it by the barrel; found I had not a safe hold, and I feared my fingers were over the muzzle, and it instantly struck me, if the pistol should go off, I should undoubtedly lose some of my fingers. The gentleman who had the pistol turned towards me when I laid hold of it; did not study the preservation of Mr. Gallagher, Jr., after that; thought then I ought to stand on my own defense, and that I was in a dangerous situation, as the man appeared to be in a violent passion. Having firm hold of the pistol with my right hand, with my left I took him round the body, to keep the point of the pistol from my body; then got him on my left hip to give him a fall as much as possible, with my foot before him; then brought him right over with a fall on the bricks. At this time I did not know who I was in grip with; did not strike Dr. Reynolds, nor he me, to the best of my knowledge; but he held the pistol fast till he was down; by the fall I seemed to renew my hold of the pistol, and got my hand towards the lock; then put my left hand to assist my right, and twisted it from him as he was lying; I was much agitated; when I was got out of the crowd a little, I held up the pistol, and snapped it to prevent any injury with it, because I did not know but it might be taken from me and injury done with it. The pistol did not go off.

Some people asked me if the pistol was loaded; seeing no ramrod I could not inform them;

some one present took the pistol and unscrewed the barrel; I found no wadding, I did not suppose it was charged, not being in the practice of using such instruments. I put it into my pocket, and asked T. R. Ryan to go home with me, and I again snapped the pistol in the fireplace behind the log to see what fire the flint would give. It did not go off. I again unscrewed the barrel and found a ball in it, and in the breech, I think they called it, some powder, the quantity I can't say; was told it was Dr. Reynolds I took the pistol from; soon after J. Gallagher, Jr., came to me and told me I must take the pistol to the mayor; went, but I knew nothing at all of the memorial or the proceedings until after the scuffle; did not know that gentleman was Dr. Reynolds till I was told in the mayor's house; I did not know what passed respecting any proceedings before I went up; I only came forward with a wish to be peaceable, and on that account I laid hold of the pistol. When Mr. Gallagher pushed the gentleman, he appeared to me to wish him to go.

J. Taggart. Going to church, on Sunday week, pretty late; met young Mr. Gallagher at the gate; he told me of the papers put up on the walls, and that he had torn one down, but that afterwards the same persons had put up another, and they threatened him with abusive language, for taking it down; was not present at the time; I only heard it from him; then went and pulled down the paper, but took very little notice of the persons who were standing there, understood they were the persons who put up the paper; one of them ex-

postulated with me, and said there was no harm in the matter. I said I thought it was a very improper place; saw no violence done, nor did I receive any abuse whatever; did not read the paper I pulled down, but tore it in bits.

Was informed it was a paper against the alien and sedition bills, by Mr. G.

What I did was in consequence of young Mr. Gallagher coming to my pew, and whispering that it was Mr. Neale's desire that this measure should be prevented in a moderate way by the people of influence; came out early, as I said, to prevent it in an easy way as possible. When I came out of the church, I found two men, one with a paper, pen and ink, standing at the east corner door. Mr. Moore was not one of them. These two men used a great deal of persuasion, when I told them I was their friend, and they would see it; desired they would go away, for it was a matter made up, that they should receive not one signature there; took the paper, and told them if it was for my brother I would not suffer it, but would persuade them to go away, for no paper should be put up there; made a little push at them. There was no riot or violence committed by them. They said they would not insult any person; told them that they were insulting me, in the first place, and next the whole congregation. They then went away without opposition; when I got these two men to the upper gate, I looked to the lower gate, and saw some person falling; did not know any of the party; afterwards saw Dr. Reynolds down. When he got up, I took him by the hand; I did not know then that

he had had a pistol; led him by the hand to the street. After I had returned, some one told me that Dr. R. had presented a pistol at some person's breast, by which I was much irritated; said it was high time to take them to the mayor.

Mr. Moore said that if it was disagreeable to the congre-

gation, he would desist, which he did; and that he did not mean to insult the congregation, and he would go with us to the mayor's; he did so; the mayor was not at home, and he went with us to Mr. Jennings'. Mr. Moore's behavior was very gentleman-like and civil.

MR. DUNKIN'S OPENING.

Mr. Dunkin. Gentlemen of the jury: As junior counsel on the part of the defendants, who are said to have committed an assault and riot, and on the part of James Reynolds said to have committed an assault with intent to murder James Gallagher, at the same time and place, I rise to address you.

The business, as it has been brought before you on the part of the prosecution, requires no particular exertion on my part, nor is it necessary for me to take up much of your time with exculpatory evidence, when the evidence given already on the part of the prosecution has gone so exclusively in favor of the defendants. As counsel in this cause, it is nevertheless fit that I should lay the whole matter before you, in order that you may see upon what frivolous grounds such serious charges have been laid against these gentlemen.

On Friday, the 7th of February, a motion was made in the House of Representatives of the United States, that the several petitions which were presented, praying for a repeal of the Alien Bill, should be made the special order of the day for the Monday following, the 10th instant, when the subject was to undergo a discussion in that House. On the evening of Friday, the 7th, a number of Irish aliens met together, as men who felt themselves, and still feel themselves particularly interested—a number of their friends equally averse to the Alien Bill assembled with them—in order to form a petition to be presented to the House of Representatives on the following Monday.

The memorial I shall take the liberty of offering to the

consideration of the Court and jury; and it will be found that it is barely a memorial to Congress, couched in language most respectful, manly, and decent, praying not the repeal of two laws, as had been alleged, but of one law by which the memorialists were aggrieved.

[*Mr. Dunkin* had proceeded in reading the memorial from the printed copy, a considerable way, when *Mr. Hopkinson* appealed to the Court, whether it was necessary or proper to read the memorial, as it made no part of the matter at issue.]

Mr. Dallas. We claim no indulgence from the Court in this case; we stand so high on the ground of law and justice, that we need none; this paper has been called a Jacobinical paper, and unquestionably the intentions of the defendants are to be found in that paper. But the prosecution is against its being read. There may be prudence in that desire; because it would not only manifest the innocence of the defendants, but it would do them honor. We will not then press the reading of it, because we do not stand in need even of that. The Court and jury will nevertheless keep the circumstances of this memorial in mind; and if there should any matter arise *ex post facto* which the defendants never could have contemplated, and which the presentation of such a petition should not have given rise to, that matter will be duly weighed; if in this peaceable and constitutional act of seeking subscriptions, they shall be found to have been wantonly attacked, then the jury will determine whether the defendants are not actually the injured parties. I will even anticipate an answer that may be made, that the ground was sacred, that it was private property; but while I allow this is true, I deny any act contrary to law or propriety; I insist that the act of seeking subscriptions was a constitutional act, and that there was no irregularity or breach of the peace in the whole proceedings of the defendants, nor any step taken by them severally which was not justified by the circumstances of the case. I am, therefore, willing that the reading of the memorial may be dispensed with.

The Court. Here is a charge of a riot, and there is evidence of actual violence; now whether that violence has

arisen out of the time and place chosen to collect subscriptions, is a matter for consideration. Suppose the paper legitimate in all its parts, but if it is carried in an illegitimate manner, and a riot and trespass ensue, it matters very little what the contents of the paper may be.

Mr. Dallas. I wish the Court to advert to the law as laid down in *Hawkins*. If several persons innocently meet, and there is nothing in the manner or purpose of their meeting improper, and they are attacked, an affray ensues, and in their own defense they become parties in the affray, they who are attacked are surely innocent of the affray. Again: If a tumult arise after an innocent meeting, and only a part of those who met innocently are engaged in it, surely those who are not even on the defensive in the affray cannot be considered as parties in it; and the law being that three or more persons are necessary to constitute a riot, it clearly appears from the evidence already given that the intention of the defendants was not only innocent but laudable, and that even if it were neither, there were not a number sufficient to constitute a riot concerned in the acts that took place.

Mr. Dunkin. I shall dispense with the reading of this respectable memorial, and shall confine myself to the facts connected with it, which were made the pretext for the present prosecution. On Friday evening, at a meeting of gentlemen, some interested by principle, and others coming in immediately under the description of aliens, met, formed the memorial in question, and the defendants were appointed as part of a committee to obtain signatures. A considerable number of names had been subscribed on Saturday, but the time being limited, made it necessary for that committee to make unusual exertions to obtain a competent number. It was mentioned to them at the time, that it would not be disagreeable to the worshippers at the church of St. Mary for them to obtain signatures there, for that three-fourths of the people who visit that church, came under the penalties created concerning aliens. In consequence, these gentlemen repaired to the yard of that church on the Sunday following, where they actually did obtain several subscribers. At

this time, some young men, owing to the impetuosity of their disposition, or the violence of party politics, rushed upon Dr. Reynolds, and used him as has been related this morning in the evidence of the prosecution. In this situation, if Dr. Reynolds had actually shot those persons, he would have been justifiable in the eye of the law; but he did not go to those extremes in which he would have been warranted.

It is well known that a party spirit has very much prevailed in this city, and it is as well known that Dr. Reynolds has been particularly pointed at by the party to whom he is opposed. He has not even had quiet in his own house, and has been exposed to particular hazard. Political or personal animosity has proceeded so far against him, as to menace his life in a manner that cannot be too strongly deprecated. In this city that gentleman has been threatened to be assassinated.

The intention has been solemnly communicated to him from an authority not to be questioned, from a gentleman who holds a situation of honor, a member of the Congress of the United States. In this situation, Dr. Reynolds did not lose sight of prudence; he asked advice how he ought to act in such a singular case, and he was advised to arm himself; he said he would arm himself with a pistol; but the gentleman told him that a pistol was an uncertain defense, it was liable to so many accidents; a dirk was a more secure weapon of defense; Dr. Reynolds, however, contented himself with carrying a pistol. And in this he was justified by every law, human and divine. As to the other three defendants, I have heard nothing that can possibly impeach either their conduct or their respectability. The moment that they found it was a measure in the least disagreeable to the congregation, they retired, and ceased even to take subscriptions there. In this respect, their conduct bears a very remarkable contrast to those who opposed them. On their parts, there were forbearance and decorum. On the others, violence and blows. We shall now call evidence to substantiate the facts we have alleged.

THE WITNESSES FOR THE DEFENSE.

Hon. Matthew Clay. Was asked by a gentleman if I knew Dr. R. I told him I did. He asked me when I expected to see him—or whether I should see him shortly. I said soon. I asked him why? His answer was, tell Dr. Reynolds to be upon his guard; there is a plot to assassinate him. I communicated this to Dr. R.; told him of it the same day, in the afternoon. Dr. R. then asked me what he should do. Told him, if it was me, I should prepare to defend myself against any assault. He asked me whether I thought a pistol was a good mode of defense? I answered I did not; he might defend himself in a better manner;

for, that pistol might miss fire; I would do it some way to answer a better purpose; told him what I thought was a more proper way; that I would take a dirk, which, if a man was to attempt to assassinate me, I thought a safer mode of defense. Am a member of the House of Representatives of the United States. This communication was made to Dr. R. some days before the affair at St. Mary's Church.

Mr. Hopkinson. Who were the persons that desired to communicate this to Dr. Reynolds? I was informed by a member of the Senate.

Mr. Hopkinson. What is his name?

Mr. Dallas. Under sanction of the Court, I conceive that the only question before the Court is, whether such a communication was made to Dr. Reynolds by respectable authority; and that respectable authority is produced, who testifies that about a week before the transaction at St. Mary's Church he gave Dr. R. notice of a plot to assassinate him; that he asked advice from the witness, and he exactly told him what happened; that a pistol is a very uncertain weapon of defense.

Mr. Hopkinson. I do insist on the name of the person—Dr. R. has taken unusual steps. Had Mr. Clay declared, of his own knowledge, that there was such a design, it would have been sufficient, but when he tells it at second-hand, it is fit the author should be known.

The COURT. Digressions are not compatible with judicial proceedings; if they were indulged there would be no end to trials. The evidence produced is eminent from character and station—a man of fortune, and member of the Legislature of the Union—if he himself is satisfied of the fact, even though it might not be really intended, and communicated under the impression of its truth to Dr. Reynolds, it is not necessary that he name the authority, since he himself says it is respectable. The name of the person is not necessary to the present issue.

Mr. Dallas. We do not object to reveal the name; but we conclude if the one is done, that it will be necessary to name the persons who laid the plot also.

Mr. Hopkinson. Did you seriously believe, from the authority and circumstances under which it was related to you, that there was such a purpose meditated?

Mr. Clay. I did seriously think there was a plot laid; the name of one of the persons in the plot was mentioned; a few days previous to this, that person had a very serious contention with Dr. Reynolds; so that it impressed itself on my mind as a fact; and, were I placed in such a situation myself, I certainly should have been prepared with weapons of defense. Lest I should appear officious in this business, I wish it to be observed that I boarded and lodged in the same house with Dr. Reynolds, and being enjoined to tell him of the danger he was in, I told him of it, and at the same time mentioned my authority to Dr. R. If the Court had thought it the least material, I should not object to mention the gentleman's name.

Thaddeus M'Carney. Am a member of that congregation, and constantly attend that church. When I came out, last Sunday was a week, I saw, at the east end, a crowd; asked what was the purport of that crowd; they told me it was with an intent to obtain signatures to a petition to obtain the repeal of the alien bill. Have been in the country only 2 years. I stepped forward to put my signature to it, when I saw a gentleman, I think Dr. Reynolds; at the same time I saw a man in the crowd who appeared to be Daniel Conroy, who seemed to be insulting that gentleman. This Conroy said that the gentleman ought to be kicked out of that place. The words were no sooner

said than the Doctor was shoved four or five yards in a riotous manner, but not kicked. Dr. R. asked Conroy whether he was a member of that church, a trustee or supporter of it. If that was the case, he would go away peaceably; believe it was before they shoved him that he used those expressions, after which they shoved him at least four or five yards. He then turned his face round, towards the east, and put his hand in his pocket, and said he would shoot anyone that would insult him. He took out a pistol, but neither cocked nor presented it to anybody, but rather held it up with the muzzle elevated in his hand. Immediately after he was laid hold of and pinioned by Mr. Ryan, and others; was close by him, and Mr. Gallagher, Jr., at the same time was at my right hand. He made a blow at Dr. R. before the pistol was pulled out; do not know whether he struck him or not, but I believe he did not; he then pulled out his pistol. Dr. R. was then thrown to the ground; a number of people were about him. I told them the person was a great Irish gentleman, and ought to be treated as a gentleman, and if he had done wrong, the laws were open. He was then liberated.

Mr. Dallas. Do you know whether it was, or was not, the desire of a number of the members of that congregation for the petition to be brought there that day to obtain signatures? I believe it was, because I for one would put my name to it. Several told me so; several did sign it. I saw no disturbance till after divine service; there was a cry from Mr. Conroy to turn out or kick out Dr. Reynolds; did

not know Mr. Gallagher before, but after I saw him at the mayor's office I knew it was he, and would know him again. I knew before the Sunday that the paper was to be brought there that day. Several members of the Congregation told me so. John M'Gurk was one; I told him there was application for the repeal of the alien bill. I don't mean to say that any of the members of the congregation said they would bring the paper there for signatures, but that a number of them would sign if it were brought there. The friends I asked to go said they would sign it there because the time was short.

William Harper. Was in the church yard about the time that fifteen or sixteen people had

come out of the church, and then Dr. Reynolds had not arrived from his lodgings. I never was in the yard before, but I saw several persons in the yard collected round Dr. Reynolds; he had a memorial to Congress, receiving signatures against the Alien bill. Did not see Mr. Duane, or Mr. Moore, or Mr. Cumming there; saw none of them there but Dr. R.; he held a memorial, and was surrounded by persons all strangers to me; was myself dragged by violence out of the church yard; was in the yard before Dr. R.; saw him come in alone. I did not see the scuffle in which Dr. R. was abused, as I suppose it happened while I was abused myself. Am not a citizen of the United States.

MR. DALLAS FOR THE DEFENSE.

Mr. Dallas. In rising to address you on the part of these gentlemen, it is not on their account that I am impelled to request a solemn and patient attention, but from a much higher motive—my duty as a citizen. This, gentlemen, is no common cause; it is presented to you for decision at a time and under an aspect which render it singularly solemn and interesting. If any of you have heard the clamors and misrepresentations which have reached my ears abroad, concerning the conduct of these gentlemen, how much astonished must you be to hear the evidence that has been produced on the part of the prosecution; to hear and witness the whole issue on the two indictments now before you! Who has not heard that a dark conspiracy had been formed to overthrow not alone the Constitution, but to subvert the very principles of our form of government? Upon such humors, upon such clamors, calculated rather to disgrace our police and the character of our citizens, I should dwell very lightly, had they not in a measure received a sanction from the mayor

of this city, the effect of which, I think, is evident in the return made of the indictments before you. You heard this morning from the gentleman who acts for the Attorney-General in this prosecution, why the charge against these gentlemen, which ought to have been comprised in one common accusation, has been subdivided into two indictments containing distinct charges; you have heard that while Dr. Reynolds is on one hand accused of a riot and assault, in common with the others, he is separately and individually charged as a rioter and assassin. They are accused of wilfully and maliciously stirring up a riot on a holy day and in a holy place, by attempting to obtain signatures to a memorial which reflects the highest honor on the pen that wrote it. But the mayor of this city charges this act as an evil one, done with an intent to subvert the Government of the United States. Concerning popular rumor or marked malevolence, I should say nothing; of me it can take no hold, although it is well known no person has been more subjected to the lash of slander than I have been; but these indictments are different from a popular rumor or a private slander. You have here the presentment of a public magistrate, no less than the mayor of this respectable city, wherein these gentlemen are solemnly charged, in the face of the public, with deliberately procuring an assembly of people with the determination of subverting the Government of the United States. I am now obliged to ask you, gentlemen of the jury, what evidence has been produced, what facts have you heard, which can give a shadow of support to such a heinous accusation? But it does not end there. According to the politics of the present day, any man who wishes to exercise the right of free opinion, any man earnest in his devotion to the principles of freedom, is marked out for party obloquy. These gentlemen who have been charged with an intent to subvert the government, already appear, from the evidence produced to criminate them, free from every imputation or even suspicion of guilt. But you have heard them called Jacobins! What! is the right of petitioning for a redress of grievances Jacobinism? Are forms of proceeding established by the

Constitution to be converted into criminal acts by the voice of faction? Are these gentlemen to be treated like the mere outcasts of society, for receiving signatures to a memorial that confers honor on its author? But the artifice and violence of faction have gone farther. It has been publicly asserted that these gentlemen should not be allowed counsel—that whoever should stand forward to defend them ought to be denounced! Or, in other words, that he should be exposed to that torrent of calumny and abuse which is so much at the command of a certain party, and who appear to hold the exclusive possession of it. What can be the object of such violence, and of such denunciation? And do those who are thus so loud against these gentlemen, on a charge not proved, do they wish that the privilege of counsel provided by the Constitution should be destroyed? If these are their views, their slanders are consistent. Do they wish to deter gentlemen of the legal profession from standing forward, whenever party animosity is elevated to a certain degree? I say, if once the independence of the bar can be shaken, our laws may be good, our courts of justice may be composed of wise and upright judges. I repeat it, if the independence of the bar can be shaken, the instant it becomes subject to the influence of fear, of power, of a faction or party, our laws, our independent judges, our Constitution, are naught. I speak it with pride, because I know I speak a well-approved language—it is of the utmost importance that the bar should possess that independence which I now exercise. I have known, indeed, some instances where the influence of power and the menaces of party have deprived men under accusations perhaps as groundless as the present, of the privilege of counsel for their defense; but God forbid that the instances should be multiplied or ever arise again.

I have thought it my duty to notice matters so much connected with this trial. I have thought it proper to show the influence which has been attempted to be set up to introduce passions where there was not evidence. There can be no doubt but this is a party case, a party question altogether. But, however vehemently party spirit may have been exerted

against the defendants, I trust I shall not hazard my reputation with the honorable Court or the jury, in being the advocate of these gentlemen. It is possible, that in a country like this we shall have the pure cements of justice polluted by party! I say, upon the critical ground where we now stand, the courts of justice must tread with particular caution. Upon the ground we now stand, there is the utmost danger that a Grand Jury or a Petit Jury may be unconsciously, though really, influenced by party. This may not be the case on the present occasion. I trust in God that nothing has or will appear to justify apprehension; but if it is not now, it soon may be the case. Look abroad. Is not party marshalled, nay armed for violence? Has not party entered into the recesses of private society and torn it up by the roots, so that scarcely any intercourse subsists between men differing upon political principles? Is not the country almost equally divided in its population by party spirit? Where is the hope of safety, where the expectation of a harmonious intercourse in society, if these furious passions are to be introduced upon every slight occasion before a court of justice? I appeal to you, gentlemen of the jury, if this is an over-drawn picture, if it is not strictly true? It is not to rouse party passions that I thus draw it before you, but to point out how it operates, and how much it has done, and how far it has proceeded, against these gentlemen, without facts or evidence even to support appearance. In other countries, and particularly in that with which habit and language have made us most intimate, all the parts of government are carried on by their proper functionaries. In every other civilized country we find the public servants adequate to the due discharge of their functions; but it is an evil in ours, that when a man finds himself vested with a "little brief authority," he conceives himself to be omnipotent, that all power is centered in himself, and that law and establishments must, instead of leading him, bend pliantly to his prejudices. This is indeed a melancholy picture of society, but it is a true one, and if we mean to mend it, we must first fairly look at it. Indeed in that country to which I

have particularly referred, party will sometimes dare to intrude. But justice is there so well administered, that probably to that circumstance alone may be attributed its internal tranquility. Were it not for the due administration of criminal justice, that government might before now have been overwhelmed in common with those where justice was not to be had. When the British minister, with all the violence of party animosity, selected Hardy, Tooke, and others, as the objects of vengeance, they were not dismayed by his power, nor by his menaces. The courts and juries have in all their convulsions maintained a dignified and enviable independence. The judges of that land are too wise not to know that where the people have no hope, their condition cannot be worse, and that if they had not this one resource from oppression, the people would rise and wrest the abused authority from their hands. The British minister brought these men before a jury, and they were acquitted; perhaps happily for him, for the nation was thereby appeased. Such is the model we have adopted—a jury is called, a jury judges, a jury decides, and to the decision of a jury, before whom the present charges have been brought, I submit with perfect confidence, as I confide in the real independence of the Court.

For my part I solemnly declare, that I never felt happier in the discharge of my duty than in being the advocate of these gentlemen in this cause. For notwithstanding all the out-door rumors, and all the noise that has been raised on this occasion, I must say that this cause ought never to have appeared before a court; but being brought forward in such a strange shape, I am willing to abide the award, since I know that it must be honorable to these gentlemen.

Having treated of the general principle and character of the prosecution, I shall now examine it by the rule of law. But before I can enter on the case, I shall state a few necessary facts. Here are two indictments, one for a riot and assault, and the other for an assault on James Gallagher, with an intent to kill him. Under correction of the Court, if I am not mistaken, I shall lay it down as a general position, that in all cases of riot it is indispensably necessary that

three persons or more should be actually concerned. The riot in the present case is charged as a circumstance independent of the alleged assault on Mr. Gallagher; but a riot is also alleged to have been committed by these four gentlemen. I will now appeal to the understandings of the jury, how far the charge in this indictment corresponds with the testimony that had been produced. Is there in the whole of this evidence on the part of the prosecution a single allegation to support this strange charge? Here it is said that these four gentlemen, being evil-disposed persons, assembled unlawfully to commit an unlawful act. This unlawful act is a riot with an intent to assault Mr. Gallagher. Wherein has it been shown that Dr. Reynolds was an evil-disposed person; how has it been proved that he premeditatedly and maliciously committed this act? Is there in the indictment anything of which he was guilty? It appears from the evidence of the principal witness in this case, Mr. Gallagher, Jr., that Mr. Moore deported himself with the utmost propriety; that Mr. Duane he did not see at all, and the single witness who saw him after service was conclusive, that he saw him doing nothing wrong. Here, then, are two of the gentlemen completely exonerated from every evil imputation. Nay, they are proved to have behaved, either in a decorous manner, or to have been perfectly innocent.

With respect to Mr. Cuming, he was not seen after he went to post up the notices which you have seen, and at that time it appears that, so far from acting offensively or riotously, he stood merely on the defensive, and afterwards went away peaceably, even when he saw the notices torn down by the clerk. In the name of Heaven, then, what has become of the riot? If three persons are necessary to constitute a riot, who, or where are the persons? Mr. Gallagher did not see Mr. Cuming after service, of Mr. Moore he speaks respectfully, and Mr. Duane he never saw at all! Can this be called an unlawful meeting? If the indictment is to be taken up in this manner, it must be proved that three persons were engaged together; if you cannot find that, then you cannot find the first count in this indictment.

With respect to the second count of the indictment, there is no evidence whatever to support it. But let us inquire what was the real object of those gentlemen in going to that churchyard, and how far it was possible they could be criminated for going there. The law is very clear on this subject. In *Hawkins* it is said that if a meeting takes place at a church-ale,⁷ where the intention of the meeting is innocent; and after they shall have met, any quarrel shall ensue, it is then an affray, because it was an action that had not been pre-contemplated. These principles apply to the present case pointedly, for even a church is mentioned. And it is implied that some act, bad in itself, should have been previously contemplated to render the meeting in any respect criminal. There can be no doubt on the mind of any man who has heard the citation or advertisement read, but this falls under the like innocent intent. If that is to regulate a jury, this must be pronounced innocent. It must be proved that, on going to the church-yard of St. Mary's, those persons contemplated some unlawful act, or that if they did not intend any unlawful act, being there met, some act of violence was committed, which did not occur suddenly, before they can be convicted agreeably to the indictment. But if all this violence occurred suddenly, without any intended disturbance, then they must be discharged.

No premeditation of an evil purpose has been here shown. The act of receiving the signatures to a memorial has not been even surmised to be criminal; and although it appears that there was an affray, which could not have been foreseen by these gentlemen, it has been proved that three of them had not any concern in it whatever. To Dr. Reynolds alone, then, can any charge for an affray be presumed; against Mr. Moore, Mr. Duane and Mr. Cuming, the whole indictment falls to the ground.

What, then, was their object? Is it possible to conceive that in this populous and respectable city, the seat of Gov-

⁷"A wake, or feast, commemorative of the dedication of the church."

ernment, where the Constitution is in every man's hands, and where the exposition of its principles is in constant emanation from the chambers of Congress? Is it possible that it should be said to be criminal, to solicit signatures to a decent and dignified memorial for a redress of grievances? If this were indeed a crime, who is the man that on one side or the other would be guiltless? Is this a ground for a charge of riotous proceedings; an act, the furtherance of which, a man would be indeed criminal who would not devote his whole time and talents to promote; an act which every man who holds the liberties and Constitution of this country dear, ought to have done; an act expressly recognized by the Constitution itself, and which every man who feels and thinks ought to support at every hazard.

Gentlemen, I will not read this memorial, because it would engross too much of your time and that of the Court, but I may appeal to the public sentiment, not on the law against which the memorial was framed, but on the memorial itself; wherever it has been read, by whomsoever it has been spoken of, the friends or the enemies of the law, it has been never denied to have been honorable to its author, decent in its language, and a good exposition of the grievances which were inflicted by the law to those with whom it originated. I do not mean in this place to enter into a discussion of that law. I barely allege that it was passed at a period when a particular policy bore down every principle before it. Far be it from me to arraign any measure of the honorable body which passed that law; but I will say, that if Congress ever had a right to pass such a law, the people have also an indisputable right to complain of it, but particularly those who were exposed to the severity of its provisions. But it will be said those people are aliens. I will reply, the citizens of these States have doubted the constitutionality of this law, they more than doubted its justice. It was therefore a crime in the citizens, who have from all parts of these States remonstrated against this law. If it was criminal in these gentlemen, it was by example of the people. They were led to express, in moderate and respectful language, what had been

before expressed with marked and pointed severity within the chambers of Congress, by a very respectable minority of the people's representatives. Let it not be said that, in petitioning against this law, they meant to violently oppose it; that, by expressing an opinion against a law, they meant to overturn the Constitution and all law. The idea can never be entertained in this court nor credited by a jury of free-men. They never meant to oppose the law, but in the mode provided by the Constitution; and so long as the judiciary sanctioned it, they, in common with every other good citizen, deemed themselves bound to submit to it. But this orderly submission must not be considered as forbidding them to seek its repeal by the mode which they have followed and which the Constitution authorizes. But it will be said, this memorial proceeds from aliens; have aliens, then, no rights, no claims to freedom or justice? A particular class of men are invited by the most flattering views of freedom and independence, safety and security, to the American shores, under the sanction of known laws and an admired Constitution. They are taught to believe that the moment they arrive they shall enter into a free participation of all these blessings. But, after their arrival, after bringing with them their affections, and those dear ties of family which secure affection, bringing with them their industry and their talents, they find all their travail fruitless; all their flattering temptations disappear, and even their hopes are annihilated. They fly from tyranny at home, and they are told in the country to which they had fled for freedom's sake: "You are become subject to the mandates of an individual, who, like all other men, must be fallible." Far be it from me to say that they will meet with tyranny here. But I ask, if with regard to aliens, all that respects courts of justice, the confrontment of the accuser and the free ordeal of a jury, are not to them totally done away? And if they are not left to the discretion of an individual, who, however wise or just himself, must of necessity receive his information from others who may not possess the same scruples? Men thus cut off from society

have a right to say: "We have been deceived, yet we are in a country which claims to be free. We will submit to the laws that aggrieve us, but we will show ourselves worthy of freedom by respectfully remonstrating against that law which was declared to be unconstitutional by a respectable minority in Congress, and by a very large portion of the people." Need I refer to this memorial? Need I dwell upon the decent dignity of language in which it is couched? Am I not justified in saying of it, that if any memorial ever presented to Congress was peculiarly entitled to respect, this is it? If any were ever more modest, more confined to the subject, more devoid of inflammatory matter or more respectful than this, I know it not, I have never heard of it. It is impossible that there could be any more freed from exception. It must be received in Congress with respect; I am sure this court will respect it, and I am sure it will merit and meet respect wherever it shall be seen and read. If this document is of that character, if its intentions are unexceptionable, and that the evidence proves the conduct of those who are now accused of a riot, was in strict conformity with its principles, under what light does this prosecution appear? Away with all those odious imputations of riotous designs! Could these gentlemen, could any man of less sense than they possess, have ever entertained the idea of obtaining subscriptions by a riot—by a riot in connection with such a memorial? The first question that must occur respecting the signatures to this memorial is, were they to be obtained by violence or by persuasion? Those who framed this memorial and started with it, must have said, "this object can be only obtained by civility and a gentle demeanor; the judgment of men must be addressed, and there is in the subject that which must carry the heart along with the head." Then if this memorial is such, and if sound policy required their deportment to correspond with it, let us inquire what their deportment was according to the evidence.

It is not for me to inquire or decide between men upon matter of opinion. I will not dispute upon mere points of delicacy.

I am not about to say whether it was right or wrong on a Sunday, and in the yard of a church, to ask men to put their signatures to this paper. Some will think it wrong, others not; it is a matter of private opinion, greatly dependent on situations and events. But this I must say, that as it respects the right of the citizen to petition, it is most important, for nothing can be more important to the citizen than the Constitution under which he lives, which guards his civil and political rights, and which should be guarded from all attacks direct and indirect. With respect to the time and place, let me appeal to gentlemen from the country, where the people, scattered over wide-spread townships, and at too great a distance to meet but on Sundays at their common place of worship, if it is not common to meet after divine service, at or near the church, and there sign papers on public occasions. Take into consideration the state of the community, and the matter appears a reasonable mode of proceeding. I have myself seen accounts of such proceedings on Sundays in the Eastern newspapers. But though even there alone these gentlemen would be justifiable, they are much more so by habits of the people whom they particularly addressed, the natives of Ireland, where it is the universal custom to transact such business after service, nay, to notice such subjects in the intervals of the service, by the priest from the altar.

Should we not, then, when we pass laws of peculiar severity, make no allowance for the inoffensive customs of those whom they implicate? When a man who may have resided thirteen years, and who has reared up a large family, after having married in this country, without a view of ever returning to that which gave him birth; when we have passed laws which deprive such men of the rights of freemen, only because they have not lived one year longer among us, must an additional cruelty be added to their injury, of denying them the right to remonstrate? Shall there be no consideration for the feelings of these people, who had been as it were deluded from their native land, men, many of whom have not

been sufficiently long in the country to have acquired an accurate knowledge of the written laws?

These men, having assembled for a laudable purpose, was it not natural to them to say, we will pursue precisely the same path we have pursued in the country from whence we came? There was no idea in the minds of the clergy that this was unholy, either as it respected the house of God, or the sacred designation of the day. All that the witness who was of the clergy said was, that in Ireland, though it was customary, it was given notice of generally by the priest himself, at the instance of the members of the congregation. Surely our legislature, while they act in this way with respect to aliens, must expect that our juries will act with some view to the habits and customs they brought with them from abroad. These men, tortured and persecuted, engaging in a respectful address (certainly a lawful pursuit), determined to do here what they had been accustomed to do in other places, and to take the opportunity when the people were collected in the neighborhood of the church. I do believe that they would have avoided the place and time if they could. I believe the answer of Dr. Reynolds was a sufficient proof of his discretion. When he was asked the reason of coming there that day, he said, "We cannot dispense with the present opportunity, as the subject is to be taken up in Congress tomorrow." Now here is a man engaged in a lawful object, who thinks himself justifiable, from the manners of his own country; but still he would through delicacy have avoided it if he could, but the circumstance was peremptory. True it is that no application was made to the priest, in order that he should announce the meeting. But people who were earnest in an undertaking might easily pass over that ceremony, and of their own spontaneous motion, without any intention of disrespect or harm, having projected the memorial, appoint those who were to go to the churchyard to obtain signatures. These were men not authorized to do any unlawful act, but to perform the lawful object of their appointment, and this they attempted by posting up this notice: "Natives

of Ireland who worship at this church are requested to wait in the yard after divine service, till they have affixed their signatures to a memorial to Congress for the repeal of the Alien bill." Now, gentlemen, the policy of the memorial being such, is it possible that any men, bent upon riot or outrage, would have proceeded this way? Can it be supposed that these few men went there with a design to beat the whole congregation into a signature? They must certainly then have fixed these notices up, that the congregation should be upon their guard, that they were going to compel them to sign? This cannot be admitted, for they gave a previous honorable notice. But, gentlemen, this application, worded as it is, is not to the congregation in general, it is only to the natives of Ireland who worship there. These natives of Ireland! Ha, these Irishmen are Jacobins, and, of course, they will sign nothing but a Jacobinical address!

We now come to the political part of the evidence. Having by an involution of ideas connected Irishmen and Jacobinism, the affection of his mind jaundiced his eyes to everything. This wholesome memorial was seen by him tinged with the same pale and sickly hue of Jacobinism, and on the instant it is resolved, in the words of the evidence, that "it should be prevented at all events." I shall now endeavor to trace the progress of this delirious declaration, in which I must introduce the hero of this important drama, Mr. James Gallagher, Jr. Intoxicated with the phantasy of Jacobinism, his heart is struck with horror upon seeing the walls contaminated with this Jacobinical notice, and he valorously resolves to pull it down. After displaying in the same breath his religious moderation and his violence against Jacobinism, he proceeds where? To his devotion? No! His religious and his political zeal were now in warm co-operation, and he proceeds to alarm the clergyman with his ideas of horror and bloodshed. Having alarmed the priest, after coming from the altar, his boiling zeal leads him to the most influential characters in the church, who are successively alarmed with the apprehensions of this terrible Jacobinical conspiracy, and

even this religious hero forgets his religious duty, so wholly engrossed is he by holy rage against Jacobinism. Forth he issues, foaming with political fury, eager to encounter those windmills generated in his own imagination by a small piece of paper. But for a moment he lays aside his politics, and he very gravely tells you that he retired to the tomb of his parent, in order to prevent any riot there—to prevent any riot, when neither noise nor disturbance of any kind occurred, agreeably not only to his own testimony, but that of every other witness, for a considerable time after. But no adventure occurring here, he again sallies forth to support his religion and display his courage at the same time with his politics. He sees Dr. Reynolds keeping at bay five or six persons who menaced him, and then this valorous hero rushes on him, and he tells you with a voice of triumph and elation, that after Dr. Reynolds was on the ground, he “kicked him three times.” These are the words of this young hero, “when he was down I kicked him three times.” This act, to be sure, was not quite reconcilable with a profession of piety, neither was it perfectly consistent with that heroism which men are apt to admire, where true courage scorns to triumph o’er the fallen, but it was perfectly consistent with the heroism of our temporary politics, for by kicking Dr. Reynolds three times while down, he became qualified to carry dispatches to France, or to go on an embassy to the savages.’

Let me beg your serious attention, gentlemen, to the evidence. During the whole period of the divine service, there is not the least noise, no appearance of riot or disturbance of any kind. I say, then, that deporting themselves so honorably to their trust, the conduct of those gentlemen bears

“The audience burst into a sudden shout of laughter, which continued for some time, the allusions were so strong and neatly conveyed; the former alluding to the appointment of Mr. Humphreys to carry dispatches to France, after he had been convicted of treacherously assaulting B. F. Bache, the late editor of the *Aurora*. The latter allusion was to the mission of the gentleman who was counsel for the prosecution, to form a treaty with an Indian tribe, in consequence of his composing the popular song ‘Hail Columbia.’”
—From Mr. Duane’s notes of the trial.

a very remarkable contrast to that of those who professed so much delicacy about religion, and paid so little regard to decency and moderation. There is much indulgence to be made for these gentlemen. The law, of which the memorial complained, operates upon the subscribers as an *ex post facto* law, and they had a just right to complain. They were not apprised of any particular rules established in that church. It appears in evidence that the pastor had it in his discretion to grant the privilege of posting up bills. Surely the existence of the power to grant is an argument of the propriety of the act itself. Would not the repeal of such a law be as just and praiseworthy an act as could be obtained on the Sabbath? Would it be less so to take signatures to obtain its repeal? We know that in the Eastern States meetings have been held in the churches to obtain complimentary addresses to the Executive of the Union. If the act is right in the latter case, it cannot be wrong in the former. The rules of construction in both cases are precisely the same; nor are we to be guided by names in either case. This is an enlightened day, and we must hope that the American people will never be reduced to that state of bigotry when the benevolence of religion will be banished and bigotry substituted in its place; when the magistrates shall protect the criminal and suffer the injured to be prosecuted. I cannot see any distinction, for my part, however prejudices may run, between the propagation of a legal and just measure in this form, and at such a time, and any other. Nor can I perceive how it should be criminal in these gentlemen to promote the repeal of a law in this manner; or that it should be meritorious for another person to mount the pulpit, and in a harrangue, after invoking the name of God, declare all the federalists deities, and that republicans (I was going to say Jacobins) all devils. These are not feigned allusions. I have heard such language made use of where no concerns of this earth should be suffered to enter; where the passions of humanity should have been soothed by the sentiments of charity and benevolence, and not irritated to animosity and hatred. I ask you, gen-

tle men of the jury, whether these gentlemen, by going in a peaceable manner to that ground, under all the circumstances related, could have contemplated any violence, much less have been guilty of such enormous designs as are charged in the indictment? Did they deserve to be so grossly treated as they have been? For we find that it is they only who have suffered violence. Are these gentlemen to be deprived of the right of expressing their opinions any more than those who differ from them? It is true, we are in a state of society so entirely divided up and cut up that, with the most diligent and minute observation, I am not able to ascertain on which side the majority lies. But it is not, therefore, a rule that either of those divisions should dictate to the other an absolute dereliction of the right of opinion. No; I thank God we are not yet in that state, when one set of men shall say and do as they please, while another only shall say and do as they may be permitted.

Were there, in putting up these simple notices, any indications of a riotous disposition? Mr. Gallagher tells you that he was abused by those who put them up; but mark the language of this inconsiderate young man. He tells you that they abused him for an insult upon their nation. Could there be any doubt of the nation that was meant, when we find the notice expressly addressed to the natives of Ireland only? It is clearly perceptible that when he called their memorial and notice Jacobinical papers, he meant and they felt the insult. But here he really meant to give a touch of his politics. A sense of religion came to him at the mayor's, for he did not tell them at the church that they were profaning his religion by posting their notices; his politics only were interested. Trace him a little further, and we shall find how very compatible his religious sentiments are with his practice. When he insulted the persons who put up the notices, they retorted, as he acknowledges, by calling him scoundrel and rascal, and by declaring that reverence for the Sabbath only saved him from chastisement, and then this young man's religion and politics retreated calmly into

church. But mark him, on returning from his devotion, how courageous and charitable—he who could bear to be called a rascal—this pious hero, upon hearing the vociferation of “kick him out,” and upon seeing Dr. Reynolds, who had never offended him, keeping four or five persons at bay, this valiant youth rushes forward, and he kicks Dr. Reynolds; but remember it was not until Dr. R. was on the ground, when his heels had been tripped up by another person. By what right should this young man insult those persons. Was he a trustee, or who made him the *censor morum*? In his whole conduct we trace a resemblance of those persons whom we sometimes hear of making their escape from one of our public institutions.

What, then, is the true charge against these gentlemen? Have we not negative evidence that after the notices had been posted up, and the clerk was in the act of pulling them down, Dr. Reynolds and Mr. Cuming were passing by, that they saw him do it, and that they acted with so much decorum as not even to say a word in opposition to it? Now if this is true, and it is proved by the evidence for the prosecution, is it not reasonable and just to conclude that all that followed of violence was to be attributed to this young man? Had they indeed been of the same violent temper, there is no knowing to what an extent a just resistance might have carried the quarrel. We know that when he insulted the persons in the first instance, he did not act as the ambassador of Mr. Neale. Could these gentlemen suppose that a clergyman in the subsequent stage would countenance such intemperate behaviour? But there was no violence whatever done, nor intended by any of those gentlemen, as is evident from the remaining testimony. This Mr. Gallagher goes to Mr. Taggart, and brings him to the place where the notices were. Mr. Taggart addresses them as good citizens, in decorous and temperate language, and at the same time pulls down the notices that had been put up the second time in their presence. But here there is no violence. “No,” says Mr. Taggart, “I reasoned with them, and they reasoned with me.”

Yet we find that he tore down the paper. Now, if there was anything like a violent or riotous disposition, would it not have been displayed on this occasion, when their object of notification was frustrated?

Now, sirs, because this self-appointed *censor morum*, Mr. James Gallagher, Jr., chose to pull down this Jacobinical paper, as he calls it, and therefore chose to go and tell the priest that the consequences would be riot and bloodshed, in the churchyard of St. Mary, are these gentlemen to be placed in this unpleasant situation of going through the form of a trial, and made the theme of public alarm and private conversation? But this young man's memory is as extraordinary as his conduct—his memory almost supercedes written testimony; for he swears that the notice put up by these gentlemen, coupled the Sedition with the Alien law. But look to the notice; it contains no such idea; the paper positively contradicts it—the nature of the case, and the contents of the memorial, would be sufficient of themselves to contradict it. The object here is to combine the idea of two laws, one of which it was presumed they had nothing to do with, while the very circumstance of coupling shows the opinion, that they had reason to complain of the other. There can be no doubt that this young man, where his passions do not take complete possession of his understanding, is entitled to credit. But his imagination was so much heated by an indiscriminate perusal of newspaper essays and paragraphs for, and against those bills, and his mind so much distorted by the perpetually reiterated cant of Jacobinism, as to have confused and confounded all order and propriety in his mind, so that wherever the Alien bill comes in, the Sedition law must from the necessity of his case be dragged in also, and thus he has formed a kind of *hocus pocus* to himself, of which every one but himself can conceive the incongruity.

After this young man had got Mr. Taggart to the spot, and had those harmless notices pulled down, by that gentleman, who it appears never read them, but took it upon his authority that they were Jacobinical papers, this young man, in the

fervor of his politics or piety, for it is difficult to determine which, at this point, goes to the Rev. Mr. Neale, and says to him: "Good God, sir, there is a plot, a Jacobian plot; the notices are stuck upon the church doors, horror and bloodshed is contemplated, and you must interpose your spiritual authority." That this poor little advertisement, so simple in itself, so narrow in its object, so bounded in its view, should in the eyes of this young man be deemed all abundant with evils as the Nile is prolific of blessings, would be unaccountable upon any other grounds, than those which I have endeavored to show—the heated state of the young man's imagination. Where could the sober and temperate mind discover mischief in so plain a form of words? To me this notice appears in its plain and unadorned style, expressing exactly what it means; to him it means everything dire and disastrous; his mind sees in it the gulf of destruction which is to swallow the whole congregation up like the heroes of the bloody buoy; and, full of the idea, he piously resolves to attack the conspirators, and with the aid of the whole congregation thresh them out of the field. But after going to his priest, he goes next to his father, who tells him, and no doubt with becoming discretion, to go and get some men and turn them all out. But it is somewhat remarkable that the young hero does not appear on the scene for some time, his passion had taken a lower station, he did not choose to go into the churchyard alone, he retired for a while to his pew. But I should have observed, that after he had gone to his father, he went to Mr. Connor, and told him, "you must stay after church; there is to be a seditious meeting." Let me put it to the conscience of the jury, and the judgment of the Court, whether it is within the capacity of a reasoning man to discover in this notice, either sedition or a disposition to riot? From the whole tenor of the evidence we find the conduct of the accused in perfect harmony with this notice, and worthy of the memorial that they held for signature. Is there, in seeking these signatures, aught that can be tortured to a seditious intention? Is a constitutional right then branded with

this opprobrium? Would the attorney general prosecute for such an act? No; I will take upon me to defend his honor from so odious a suspicion. I will boldly say that the man who would call this a seditious act, ought never to participate in the administration of justice, nor in any station in a court of law! What! shall one class of people be at liberty to address one branch of the government, and a second class be exposed to slander and persecution for addressing another branch of the government? Shall they not be permitted to do this just and legal act without being branded with disrespectful epithets? Such acts of injustice are not calculated to promote social security or public character; they are calculated to inflame, and produce a dangerous and fatal collision of party passions; effects which could never be produced by a memorial drawn up with so much decency and moderation as that which has been called a Jacobin paper.

Gentlemen, I ask you, I ask any man who has either read this memorial, or heard the evidence which has been brought forward, to point out the sedition in it—to point out the tendency therein to produce riot. And are you to be called here to determine that to be criminal, which must have reached every ear and every heart present, as innocent? And this, because this young man had created hobgoblins which affrighted him with their unreal deformity! Are the wholesome and reverend courses of the law to be made subservient to his weakness, or are his intemperate actions to be laid hold of by party, to pervert the sacred ends of justice?

This is, throughout, a party transaction; the first and only licentious disposition which I can discover in the whole of the evidence, is exhibited by this young man, Mr. Gallagher, Jr. It was he that tore down the notices. It was he that brought Mr. Taggart to tear down the second. It was he that alarmed the priest, and disturbed the church service. It was he that alarmed Mr. Connor into a belief of such a riotous design. It was he that called the memorial a Jacobin paper, and the holders of it Jacobins. It was he that alarmed the aged Mr. Conroy, and clamored for his insulted religion. I beg his par-

don; it was not his religion that he felt for here; he lost all consideration for its precepts in his vehemence against Jacobinism. He takes upon himself to say that is wrong which men, at least as well informed as himself and as free, say is right. But was it for him to be the umpire in such a case; or would he have ventured to take upon him to dictate in such a case; were he not previously confident that the numbers on this side were so much superior to his antagonist? Had the congregation been equally divided when they came out of church, what might not have been the consequence? What would have been his conduct? Why, this self-created Ajax, he who boasts of attacking Dr. Reynolds while that gentleman kept five others at bay, and who so bravely boasts of having kicked him when he was down, this hero would most probably have retired to his seat or his home.

We have heard much of Jacobinism; great use has been made of this word for delusive purposes. As to Jacobinism, as it is generally described, I need not declare my abhorrence of it. I am as much opposed to the arbitrary and sanguinary character of Jacobinism as I am firmly devoted to peace, security, and freedom. I am for republicanism. It is on the principles of republicanism I can rely for my own liberty and my family's protection; my interests are inseparable from the freedom of my country, and I must therefore be from principle as well as interest a foe to Jacobinism, or any measures that would lead to disorder. But I cannot help expressing my astonishment that any man should be found capable of daring to brand such a proceeding as these gentlemen had in hand with so base an epithet; to denounce as riotous a constitutional right, the obtaining of signatures to a respectful memorial addressed to the proper organ of government. But all this outrage of propriety, in words and deeds, is accounted for in the intemperance and inconsistency of this mistaken and thoughtless young man. Yet after all his political zeal, this principal hero of the drama, when he had created this storm, left it to work, and retires awhile undisturbed. Upon entering the church his piety takes fire, and he spreads the flame to Mr. Taggart, Mr. Connor and the priest. His trou-

bled spirit, impatient under his political fervor, takes instantly another direction, and he modestly tells you that he retired from the scene awhile to watch over the tomb of his mother. How powerful is frenzy or infatuation; he who could feel all those lively impressions of danger to the government and of defilement to his church, and the next moment impressed with the sweetest impressions of filial remembrance, retiring from the sacred precincts where the remains of his parent were entombed, plunges into a degree of violence that outrages all law, all the amicable and humane principles of religion, and all the impressions of a sincere and reverential sorrow. He had but just stepped from the tomb, when his ears are gladdened by the sound of a voice familiar to him, crying aloud, "turn him out;" he rushes to the spot, and he sees Dr. Reynolds keeping four or five persons at bay; in a moment he forgets his religion and the solemn tomb, and he joins loud in the shout of war; he runs into the scene of battle with passions which while there was danger he did not manifest. After he had stirred up alarm and rage he retired for awhile, leaving it to others to carry on the war; but he tells you himself that on his return he directly went to up to Dr. R. with a determination to put him out! By his own statement it appears he did not return until there was no danger, and then his courage mounts to the highest. I claim your particular attention to this part of the evidence, because it is important with respect to the two indictments.

I will now endeavor to analyze the facts which have been produced, in order to prove that these persons were neither of them engaged in a riot.

The first witness, Mr. Brown, says that he saw Dr. Reynolds and Mr. Cuming together, putting up the notices, but that they were standing very peaceably, and were guilty of no violence. This witness gives no evidence whatever of a riot, and this is the only witness that gives any testimony that applies to three persons, which are the legal number to constitute a riot. I ask any man whose mind is divested of party prepossessions, whether there is the least circumstance that can be entitled a riot? I ask further: If this is a point es-

tablished, what evidence is there to criminate Mr. Duane or Mr. Moore? I ask you, gentlemen, is there one of you who would conceive himself wrong to be engaged in the same way as they were? With respect to Mr. Cuming, there is nothing said about his conduct during the whole affray. All that is said is by Mr. Gallagher, and that took place before he went into church, and nothing appears to prove them disposed in the least to riot. Can it be necessary for me to proceed in one argument to establish the innocence of those men, beyond what evident observation must point out?

May I not here with confidence dismiss every further discussion of the question of riot? I appeal to the jury to reflect for one moment, however mistaken those men may have been in the opinions of some with respect to their going into the churchyard on Sunday, whether when they went there it was with an intent to obtain their object by any criminal means. Was it not a lawful act? And where, then, is the proof of criminal intentions or violence on their part? A fray was produced, but not by these gentlemen. It was produced by the unwarrantable conduct of Mr. Gallagher. Let not those who are the authors of mischief complain; much less when they are the first actors in violence. These gentlemen went into this churchyard without any view to violence, but they were forced from the object for which they went; they were thrown out of their place; they had not time even to give explanation or make an apology, because Mr. Conroy came up, and told them to go out, and before they had time to explain, the cry of "turn them out" was to be heard. We find that Dr. R. was not at all unwilling to go out of the churchyard. I wish the Attorney General had subpoenaed Mr. George Meade, that we might have heard what he had to say concerning the idea of young Gallagher about Jacobinism, which had so much got the better of this little gentleman's judgment, that I am really astonished, generated as this business was, his prediction was not verified—that bloodshed did not take place.

Having said thus much on the riot, let me call you attention to the other indictment which is before you, against

Dr. Reynolds alone for assault, etc. I am surprised that two indictments could possibly have been instituted, and I can no otherwise moderately account for it than by supposing some error or misapprehension in the proceedings at the mayor's. We have seen that in Dr. Reynolds' conduct nothing has been proved of a riotous nature; yet here is in one, the act of riot exhibited against him before you, as a rioter. But is it not extraordinary that in one moment you should indict him for riot, and punish him for it, and in the next present him for assault with intent to murder? It is a well known and sound rule of penal justice that no man can be indicted twice for the same offence; but I ask you, if you were to find both these indictments true against Dr. R., whether he would not be punished twice for the same offence? But how can this be called an offence? It is not pretended that he struck anybody, or that he attempted to strike anybody, but when he was attacked by the redoubtable Mr. Gallagher, he produced a pistol. I am here not to say he was right in producing a pistol, but I will say that he was not wrong. If a man is surrounded so that his strength is overpowered, he is justifiable in using this weapon, not to destroy life, but to hold it *in terrorem*, in aid of his physical strength. I will show that this is the positive language of the law, as well as of reason. I am willing to maintain that a man is justified in carrying arms to defend himself. Every assault is actionable, but there is no doubt that arms are to be used only when the blow cannot be avoided. If any man attempts to strike me, the law allows me to anticipate the blow. If I cannot prevent his making use of his strength, the law of nature and the law of reason justify me, not in applying to extremes, but if it becomes necessary to my safety, I am to make use of the weapon to prevent the blow, and even to take his life, if necessary to my own safety.

Dr. Reynolds was assailed; a crowd came about him; there was a general cry of "push him out." We must suppose him placed under all these indications, and when young Gallagher approached him with threats, while at that moment he was keeping four or five persons at bay, he came up, influenced

by resentment to assist in the business. Dr. R. would have been equal to the contest with Mr. Gallagher alone, but his hands were not equal to the contest with the addition of him to four or five more. In this predicament, and being struck, or struck at by this young man, having a pistol in his pocket, Dr. R. produced it, and though it was said the pistol was loaded, yet we find he did not make use of it but to extricate himself from his assailants. The probability must be formed from the nature of the case, which is, that the pistol was produced at the moment that the push was given. When personally attacked, he says, "I will not suffer myself to be insulted." I ask whether, in common conduct, which must be allowed by every man who hears me, he would not, if attacked by four or five men, if he could scarcely keep these persons at bay, and had not strength to encounter them, but still having the command of himself so as not to draw his pistol, if he had any, if he saw the sixth man coming up with a menacing appearance and shouts, would he not draw his pistol from his pocket under these circumstances and say, "no, this is going too far;" "till I was struck I checked my passion; I would not go to extremities." Would not anyone have added, "I will now defend myself?" This was an act which every man would have done, to prevent further insult. If he had contemplated any violence, is it possible to suppose that, he being armed, would not have committed it before? They did not know he was armed. Besides, it does not appear whether the pistol was cocked or not. This pistol was put into the pocket of Dr. R. with the same view as it was used for—to protect his person from assassination, and it was produced from his pocket to protect him from insult. Dr. R. was well known to the pastors of that church, and to have suffered expatriation and the sacrifice of the dear ties of kindred, friends and an enviable society, in promoting the restoration of liberty of conscience to the Catholics of Ireland. He went to that place with a view of obtaining subscriptions to a memorial for the relief of his country people arrived from Ireland. He went there peaceably, without any view of violating the sacred grounds, or

to offer any insult to the congregation, for they had broken up before he came, and before he could utter an apology, abusive language was poured out upon him. All this he can bear, and even the words "put him out." He can bear even to be kept at bay by four or five men; but the moment this young man put him in further peril, here he is struck. He says he can bear it no longer, "any man that offers me violence, I will kill him." These words I put in the strongest light they can possibly bear, because I know the law will bear me out in it.

Gentlemen, why was this pistol put in Dr. Reynolds' pocket? Was it to murder Gallagher? Was it with a design to use it on this occasion? No! I am sorry to say that we found occasion for the evidence of Mr. Clay. When we heard his evidence, every man here must have seen occasion for him to wear a pistol; every man must be convinced that there was a plot to assassinate Dr. Reynolds. Mr. Clay is a gentleman of known integrity and veracity, and would not suffer this impression to be made on his mind, without his conclusions were drawn from the strongest evidence. There can be no doubt but there did exist a conspiracy to assassinate Dr. Reynolds, which was communicated to him prior to this time. So soon as he heard it he asked advice; he asks, "shall I carry a pistol?" He is told that there is no security in a pistol, that the danger was such as to require a more secure weapon for defense, and that he ought to carry a dirk. What man would have hesitated to protect himself against a menace of that kind? I appeal to every man in court, I appeal to the Attorney General himself on this point. He carries a sword-cane, and so do I. There are many gentlemen in this country, who from the occasion of the times, and the combination of circumstances, also wear sword-canes. There were two periods when everyone wore weapons of defense from necessity. The first when the police was so defective that robberies were constant, and self-protection became necessary through the defects of the law. The second, when political fury rose to such a height, as in 1785-6, that it no longer became a question of defense against robbers, but against

political opponents. The times are altered, or party violence has become less serious; we see, indeed, that the spirit of party yet preserves a disposition to assassination, in the threats against Dr. R.'s life, and that he at the present time has occasion to act on the defensive as everyone did at these periods. There is no danger to be apprehended from a man who carries a sword-cane or other weapon of defense. There is no law in Pennsylvania to prevent it. Every man has a right to carry arms who apprehends himself to be in danger. If every man has a right, was not this gentleman justifiable in putting arms in his pocket, when so special an occasion commanded him? Here there is no danger of error; it was a mere accidental circumstance of Mr. Clay lodging in the same house that brought the design on Dr. Reynolds' life to his knowledge. Mr. Clay is a man of too high credit and acknowledged understanding to render what he says questionable. The Court must be satisfied of its propriety from so respectable an authority.

A few words more as to the manner of this business. Mr. Brown says nothing at all about the riot. Connor says that Dr. R. observed that he would defend himself against every insult. This was before he was pushed by Gallagher, but perhaps this gentleman might have been mistaken as to the time these words were spoken, for from the other evidence it must have been later than he places it. Now, gentlemen, you will perceive by the indictment that he is tried for assault with intent to murder, and yet throughout the whole of the evidence we hear nothing but defensive language, and defensive actions from the party! Where, then, is the malice aforethought? This must be in every murder. This must be proved respecting assault. My client says that he contemplated no violence, but all he did was to prevent outrage on himself. It is proved that when he drew the pistol he considered himself to be in danger every moment, and he had evident foundation for this belief. Every act that produced riot and confusion seems to have been in the hostile treatment he received, and there is no ground for believing that he intended to injure anyone. He was exposed to gross

insult and abuse; but he proved that he would not always submit to it. Insult he did submit to in being thus shouted at, and being thus bayed. But he withheld his last resource till he received a push from this mighty Goliath, and he then thought proper to stand on his defense by the production of a pistol. He then says, I will make it the worse for him, if any man insults me.

The next witness meriting our attention, is Mr. Gallagher himself. He went forward and determined to put out Dr. R. Here we find him instigated by a sense of his religious obligations. I hope his knowledge of religion is more correct than his sense of politics, in denominating this act sedition and Jacobinism. He saw that the party who were opposed to Jacobinism were sufficiently strong to prevent these measures, and therefore he thought himself perfectly safe to go and join it. The narrative exhibited by Mr. Ryan is a perfect picture of this transaction, and therefore I shall again call it to your recollection. [Here *Mr. Dallas* read that part of the testimony.]

There cannot be a question, whatever doubt might hang upon your minds with respect to the other witness, that Mr. Ryan's testimony must be correct. The time of presenting the pistol, he tells you, was after Dr. R. had received the push from Gallagher. He says Dr. R. stepped back. I presume to put his hand in his pocket. He says he was by and saw G. arrive upon the spot, as well as the first acts of G., and Dr. R. pulling out his pistol. Gentlemen, if this pistol was in so bad a state as this witness states it to be, it is probable that he only put it in his pocket at some former period, and let it remain there, but on this occasion used it *in terrorem*. Now, if Dr. R. had come with a bloody mind and with intention to kill, as the indictment states, would he have brought a weapon in this wretched condition?

Mr. McCarney says that Dr. R. was seized and pinioned, the moment the pistol was produced. However, I shall not dwell on his evidence.

I have taken up much of your time, but I conceive this case so interesting to every citizen that I feel the force of a

good maxim to resist the first appearance of evil. I am persuaded I am before a Court who will not indulge the least antipathy to those who have been called Jacobins, nor favour for Federalists. Far be it from me, therefore, to suppose that you will not do justice. There can be no doubt but there are men who will think they have a right to bring every Jacobin to the ground; but the time has not yet arrived for a Court to say what opinions are worthy of merit or demerit. I am sure that you will not say that a man has been guilty of assault with intent to murder merely because he was the object of party hatred and revenge. Believing that you will act uprightly, I shall rest satisfied that you will acquit the defendants on both indictments.

MR. HOPKINSON FOR THE COMMONWEALTH.

Mr. Hopkinson. Gentlemen of the Jury. You must have an uncommon degree of discernment, if you can still recognize the case now in issue, and which you have been sworn to try, through the tedious and verbose harangue, the political confessions and discussion, the low, vulgar and unworthy wit, which the gentleman who has just sat down has thought proper to introduce—a kind of wit which he would have been ashamed to have offered to a company at his own table, but which he has thought sufficiently dignified for you and this place. But it is particularly observable that it is against Mr. Gallagher, on this occasion, he has chosen to make a violent and unprecedented attack, expecting to destroy the weight of that gentleman's evidence in your view, and thus obtain his end. Mr. Gallagher, whom he thus assaults, has been brought forward here to give testimony on the part of the Commonwealth in a prosecution instituted to preserve the peace of that Commonwealth and your peace as members of it, for every man is interested therein. Coming forward in this capacity, he has been treated in the most rude and unmanly manner, and in a style of indecent language, such as the whole ability of that gentleman could produce. The effect, it is sure, has been to excite a laugh such as that gen-

tleman's wit can raise. But to you I appeal to say, if Mr. Gallagher's conduct as a witness has not been unexceptionable, and it is only as such that he was a proper object of observation at all. Did not Mr. G., with equal candor and truth, answer the questions preferred to him on the one side as the other by the counsel for the defendants as for the Commonwealth? Did he not conduct himself throughout with entire fairness and propriety? How, then, has he deserved the treatment he has received? Have we seen in Mr. G.'s deportment any of that passionate violence that indiscreet intemperance, that party madness of which we have heard so much from Mr. Dallas? And yet one-half of the gentleman's language has been directed to place him in these exceptionable views and depreciate his testimony. You have heard much of the value of the independence of the bar and of courts. But what is to become of the utility of courts, if the very sources from whence they derive that information on which they are to ground their decisions, are to be dried up and brought into public contempt in the manner now attempted? What gentleman will come within these walls as a witness, if he is exposed to such illiberal treatment and personal abuse?

A gentleman comes here, bound by a recognizance from which he is unable to extricate himself, to depose the truth and perform a necessary duty to his country, and finds himself, in the face of this Court and of that country, an object of ill-timed sarcasm and jesting which he is obliged to hear, and which, by the rules of the court, it is well known he is unable to answer. Viewing, then, the independence of witnesses as of at least as much importance as the independence of the bar, the attacks made on Mr. G. were indecent and improper in the highest degree. Did Mr. G. come here to be made an object of public laughter, the plaything of the gentleman's amusement—to be called "the hero of the drama," to be told "that he went to his father," and so forth? His object was, gentlemen, to make this young gentleman little in your eyes, that the weight of his testimony might be taken off. But to close this list of ill-timed and unjustifiable jokes, and to fill up the measure of severity, the

tomb of this young man's mother was not permitted to escape unstained with comment. Here the gentleman failed of success; the public mind shrunk with horror from this sacrilegious attempt upon it, and a solemn and awful silence was found where the gentleman expected a return of that loud laugh which has so exhilarated his spirits. His mirth recoiled upon him, and overwhelmed him with that confusion which is the natural consequence, even in the most shameless, of an unsuccessful attempt at unjustifiable merriment. When this gentleman shall come to his pillow and the power of reflection shall rise out of the giddy tumult that now envelops him, this deed I am sure will give him pain.

The gentleman observed this was not a common case. I did intend it should have been a common case, and as such I introduced it, and intended it should have appeared to the jury; but the gentleman would not let it remain so. I know no party in it. It was my wish and desire it should have come before you on legal testimony and legal ground, as an indictment for a riot, without anticipating the subject, right or wrong. But the gentleman has indulged himself in a wide field of political discussion, and has honored me as well as Mr. G. with a portion of his wit, of which I shall in course take proper notice. Early in his address he made a direct avowal, that he considered this a party question, and he treated it in that way altogether. If this is a party prosecution, let me ask, who made it so? Does he mean to say that the mayor was instigated by party motives in this business, and therefore brings it forth in this shape? If he does not think the mayor has thus prostituted his office and his oath, then it must be the Attorney General. But I will not presume that he lays this charge to the Attorney General, because I know the gentleman has too respectful an opinion of that offer to believe it was he. If it was neither of these gentlemen, it must be the Grand Jury, who have prostituted their oaths to indulge themselves with the gratification of party spirit. Perhaps he will not be willing to acknowledge either of these charges. If, then, the gentleman will not stand up and accuse the mayor, if he will not stand

up and accuse the Attorney General, if he will not stand up and accuse the Grand Jury, whom in the name of justice does he mean to accuse for this party malignity and persecution? Does he mean to suggest, gentlemen, that you have been brought here to be instigated to your decision by party favor or party hate?

The next point of discussion, and which indeed was the first on which the gentleman departed from the true point of discussion in his argument, was by delivering some opinions on the constitutional right of petitioning for any redress of grievances of the national legislature. Gentlemen, I am not here called upon to make my political confessions, nor do I stand here to catch the public ear with professions of political rectitude; let my obedience decide whether I observe the laws and have attachment to the constitution of my country; by them I am willing to be tried. So far as relates to the right of petitioning, I am free to declare that there can be no doubt that every citizen has that right, and is justifiable in exercising it in a proper manner and proper place; but I do also declare that aliens have no right whatever to petition, or to interfere in any respect with the government of this country. As the right of voting in elections is confined to our citizens, the right of petitioning is also. If aliens do not like the laws of this country, God knows there are ways and wishes enough for them to go back again. If they undergo greater hardships under the operations of our laws than of their own, let them choose the lesser evil, and this they have an undoubted right to do. If our citizens see the laws wrong, I am the last to wish to prevent them from petitioning for their repeal, and execrate the man that would. They have an unbounded right; but it appears that a majority of the persons assembled to sign and procure signatures on this occasion are not citizens of the United States. Let us, for a moment, even admit that it was right for them to petition, this right should be exercised in a proper manner and at a proper time or place. I will say the greatest evils this country has ever endured have arisen from the ready admission of foreigners to a participation in the government

and internal arrangements of the country, to demonstrate which I need only appeal to the acts of the Government. You cannot yourselves forget when this country commenced its career as an independent nation, it felt itself impressed with all the frank and generous failings of youth, all the unsuspecting candor of inexperience; it was delighted and infatuated with the idea of becoming an asylum for the unfortunate and oppressed of all countries, and too readily opened its arms to all. This has been the bane of the country. Had Americans been left to themselves, we should not this day have been divided and rent into parties; it would not have been necessary that one party should carry pistols and dirks for defense against the other, at the recommendation of a member of Congress, or any other person, and that this conduct should be justified by a public advocate in a court of justice. I do say that we never should have been brought to this state, or that such doctrines would never have been advocated, had it not been for the introduction of this foreign leaven amongst us, that has fermented the whole mass of the community. At the first establishment of our government it was determined to give foreigners a full enjoyment of all privileges after a residence of two years. After a while they discovered the necessity of making the residence longer, and made it five years. But experience proved that even five years was not long enough to accommodate these people to our manners and customs.

Fourteen years is now thought, by the wisdom of the Federal Government, a proper period to drench them of those dangerous habits and propensities they too often bring with them. We have even seen persons come among us who could not speak our language, who enjoy the same benefits and do the same things as our citizens. But if persons come here to take protection from the severities of their own government, they must abide by our laws, and not by their turbulent dispositions, engage in broils and call it a legal meeting. Have we not seen foreigners, by their forwardness and intrigue, forcing themselves even into the administration of our government, and ruling over us? Are there not those who,

but a few years since, scarcely rose above the characters of needy vagrants and beggars, now riding in their carriages over us and our children?

I will now introduce the business itself. As to the manner and place of conducting it, as to the manner and time, it was in the highest degree improper. If these gentlemen went to obtain petitions, for this or any other purpose, those petitions ought to contain the mind of the persons who signed it. If this is necessary, let us examine how far it is probable the object could be maintained by the means they used. Here is a very lengthy petition, containing a variety of learned political disquisitions on the constitution, profound inquiries into the laws of nations, and a deep investigation of the obligation of the treaties executed by this Government, etc., which would require at least half an hour to read. Will any man tell me that these inquiries and discussions could be made by standing at a church door, with pen, ink and paper in hand, to arrest the passing multitude, and that the object was to convey to Congress the opinions of those people? Could this opinion be formed or obtained in this hasty way, without time to reflect a moment on this subject, or read a line of the paper to which they are required to give an implicit assent? This is, indeed, completely misleading the people, who should at least know what the paper contains before they should be required to sign it, and not depend entirely on the possible misrepresentations of a few. Many persons have been thus brought to sign petitions, who have afterwards declared that they did not know what they were about, that different objects were stated to them from the true ones. If so, who deceives, who insults the people? Such a petition is not deliberately their opinion. I therefore infer (for the notice does not say that these people are called upon to deliberate or reflect, but to sign), that these are the persons who treat the people with contempt. They present them a paper; they say to them, "You cannot understand this thing, it is above your capacity—we have thought for you—sign it—it contains such and such particulars—it is all right." A few chosen persons impose upon a multitude of aliens, who ap-

point them to draw up a petition, and the people are to sign it. Here it is that the people ought to take fire; here it is that they ought to be offended, because it is requiring them to sign an instrument without any knowledge of its contents, or opportunity of inquiring into its merits. But this was not a proper place for executing this business. Are not those people satisfied that the flood-gates of the press are open to them, to spread sedition and discontent over the land? Are not the streets and market-houses open for them to bawl out their political opinions and rail against the Government? But they must profane the temples of God with noisy tumult, disturb the devotions of the pious and insult the throne of Heaven with riot and confusion. But no, they have deserted the streets and markets, and have resorted to a sacred place to forward their works of disorder. This, gentlemen, calls for a serious mode of punishment, and merits the most serious animadversion. It is not merely my fancy which conceives that an offense is committed in transacting the business in a church or a churchyard, but I am speaking to you the language of the law; for the law regards the place sacred in which divine worship is carried on. Extraordinary powers are given to those to whom the care of those places is committed, and an act which would be justifiable in other places is prohibited here. I cannot undertake to pursue the gentleman through his lengthy discussion of the alien law, believing it to be my duty to submit to the will of the American people as expressed by their constitutional organs. I am not in the habit of minutely scanning every law that is promulgated, of balancing and scrutinizing every section and line, searching for imperfections, fancied or real, and rejoicing at the discovery of some ground of clamor. I leave such tasks to such ingenious gentlemen as Mr. Dallas, and content myself with obeying the law, which I find neither oppresses me nor my neighbor, having too much respect for the source from whence the laws of this country proceed to believe them unconstitutional, or oppressive from slight suggestions or envious discontent.

The gentleman has said that aliens have been invited from

distant shores, and then are turned back again at the will of a man easily deceived. Gentlemen, are you called to try the constitutionality of the alien law? No! Does this reason justify the defendants in going to churches and churchyards, at the hours of worship, to obtain the repeal of that law? No citizen can justify the measure, no person can conceive that consecrated ground is thus to be trampled on! Does the gentleman mean to question the right or policy of the Government in making that law? If either of these was his object, this is not the time or occasion to discuss them. It is not your province, nor the province of this court, to decide on that law; you should not now even think whether such a law has been passed or has not. It is your province to say whether Dr. Reynolds and the rest of the defendants are guilty of the riot charged on them or not; this is what ought to be the object of your inquiry. The gentleman has endeavored to justify the measure by two facts: one is, that it is common in the Eastern States to meet in the churchyards for public business. The Attorney General, who is from those States, declares that he never knew any instance of the kind in his life. The gentleman has gone further, and brought the evidence of Mr. Carr, to prove the existence of this practice in Ireland, the place whence these people came. If they came here with a view of avoiding the oppression which they complain of in their own country, they ought not to expect to bring with them their bad customs; at least they cannot blame us for rejecting them. But the case mentioned is a case very different from the present, and if its propriety is at all contended for, it can be only under the same circumstances. There are no meetings held but upon the particular call of the priests. Besides, the occasion is different. It is well known that the Catholics in that country are the particular objects of legal severity, and that they have endeavored to obtain the redress of this grievance. Their churches belong to themselves, and if they resort to them for meetings, in that case, it is to remove a difficulty which presses on their religion. This is a justification for the practice in that country which does not exist here. But, at any rate,

the practice of that country is no rule for us. If they choose to keep a tavern in their churches, we are not bound to suffer or to sanction it. The gentleman, in this part of his long speech, thought proper to throw out observations which were intended to make a laugh, I suppose, at my expense. I am prepared to meet it with as hard blows at least as the attack came; but I perceive he has made his retreat out of court. I conceive that generosity demands of me to spare him, but not without regret.

He has endeavored, gentlemen, to influence your minds, by throwing a false coloring over the events of the present times in this country. He has raised up to your view the appalling spectre of murder, bloodshed, and riot; of party marshalled against party for mutual destruction. I see nothing of it. I do not perceive that strength in the party opposing the measures of our Government, which he would have you believe. Some few disorderly and discontented people indeed may be found, whose turbulent and jealous dispositions cannot be quiet; but from the gentleman's representations, from his horrible predictions and bloody fears, it would seem as if all the energies of our Government, all the strength of the American people, is requisite to keep down aspiring faction, and stem the torrent of foreign influence and party. I know not what secrets of plots and revolutions that gentleman may be acquainted with, or what are his sources of information. For myself I foresee, I fear, no such things. It is not to be denied that many Americans, many honest and true Americans, have become, by intrigue and delusion, connected by the designing demagogues in many points, and in their own opinions of many measures. But still, I do not distrust my countrymen; I do not fear them. They have property, they have character, they have friends at stake, and they will think well before they throw them all at hazard. They know the value of order and good government, and will not easily sacrifice them by artful misrepresentations, by systematic falsehood and by every species of delusion. Some of my countrymen have been led astray, and may be now combined with designing men, who affect to be seeking

their good, when, in truth, they are leading them to destruction. But when the mask shall be thrown down, when, emboldened by deceptive success, these creatures shall come out in their true characters and with an avowal of their real designs, their influence will vanish, and they must shrink into detestation and contempt. Let the monster rear his head uncovered, and a single blow will prostrate him. I know that the fondness the American people justly have for their liberty, and their jealous caution against any infringement, is used as an engine of deception, and sometimes makes them the dupes of intrigue. But this can only succeed to a certain point. Beyond this they cannot be brought without just cause and serious deliberation. They will sign improper papers; they will say a thousand indiscreet things; they may even do some; but, when it comes to serious mischief, to revolutions and bloodshed, they will stop and reflect. They will ask, where will this end? What am I to gain by it? What are the oppressions of my Government, that require such awful, such desperate remedies? The American will look to his habitation, peaceful and undisturbed; his eye will rest on his family, happy and smiling; on his business, flourishing and plentiful; on his character, valuable and good; on his friends, dear and respectable. What then, he will exclaim, can I hope for in a change? What have I not to fear from it? What have I to expect from revolutions? What have I not to dread from them? Let those who, possessing nothing, have everything to expect from changes that invert the order of society, and remove all things from their places, who can never be easy but in broils, tumult and revolution, attempt this work of iniquity; for me, I'm done with it! Let, then, this foreign junto, this imported gang of discomfited seditious, but show themselves in their just character, and such of my countrymen as have been deluded into their train will drop off rapid as the leaves of Autumn from some bleak old tree, and leave the bare and exposed trunk in all its deformities, a public mark of derision and reproach.

I will not run over an explanation of those popular terms which Mr. Dallas has introduced to you. I will not call my-

self a Federalist, or another man a Jacobin. I will not say I am a republican and a friend to freedom, as he has, but I will say, that I am bound and determined, at all events and extremities, to support the will of the people as expressed by the constitutional organs of their Government, and this is all the party I wish to know, all the name I want to be designated by.

I beg your pardon, gentlemen, for taking up so much of your time on these topics. I have thought it necessary to say something upon them, because the gentleman opposing me has said so much. I will now proceed to show you that, agreeably to the facts that have been produced, and agreeably to law, these persons can and must be convicted of the crimes charged to them in the indictment; and I will, therefore, show that the arguments used in your hearing to exculpate them are without foundation in fact or in law. The gentleman first complains of two indictments. A riot is composed of a number of facts of different kinds committed by different persons, some with one degree of aggravation, some with another, and upon those depend the atrocity of the general offense and the criminality of each offender, and then, of course, it is proper for the Attorney General to present the whole of the transaction to you in the manner of their occurrence. It was not for me to decide the particular guilt of each of the defendants, or involve them all under a joint and equal charge, but to lay every charge before you in legal form, and leave to you to discriminate or not, and act on the offenders as the testimony shall warrant. I am willing to rest the decision with a jury of my country. I have brought all the charges to your view, and rest it with you to substantiate which charge you please, or both, or neither. You have a right to substantiate both, if from the evidence both appear to you to be proved. Here are a number of men charged with a riot; some of them may have been guilty, in the prosecution of this riot, of more atrocious actions than others, and therefore there ought to be a separation of their guilt. It follows that, though several are indicted on one charge, and for the general offense against the peace

of the country, one having committed a more enormous crime than the rest, may be charged and convicted of an assault with intent to murder. In such cases it lies with the court to determine how far the different degrees of guilt in the parties merit different punishment, and to proportion them to their several crimes. But it is for you to decide on the facts, without any view whatever to what effects will be. You may find either or neither of these indictments true, as the weight of evidence shall support them.

I shall now undertake to prove to you that a riot has been committed, and that the persons pointed out in the indictment have been guilty of that riot. In order to prove that I am right in the first assertion, I shall produce you a legal definition of a riot. The counsel for the defendants explained this to you from memory; he said the persons charged must have assembled with intent to do an unlawful act. This is not the law. We find that a riot is in fact a tumultuous disturbance of the peace, by three persons or more, whether the act in itself were lawful or not; if carried on in a violent and tumultuous manner, the persons are guilty of a riot. In the same authority, we find it laid down that where persons assemble together innocently, and do form themselves into parties breaking the peace, they are guilty of a riot; and this is precisely the case with the one which is now before the court.

I will proceed first to show from the testimony that all the persons in the indictment were present, and assisting in this proceeding. Mr. Brown, the witness, expressly says, that he saw all the persons; he saw them all at the tombstone of Mr. Burns. Mr. Connor expressly mentions Dr. Reynolds, and Mr. Moore, and Gallagher mentions Cuming, Reynolds and Moore. So that the persons were all seen at different periods by the several witnesses, and all of them by one. They were all in this churchyard at one and the same time. I shall now go to prove that they have been guilty of a riot.

First, in order to make out the whole number of persons named in the indictment, according to the legal number necessary to commit a riot, it is not necessary that every one

of them should be guilty of an act of violence—that every one of them should have a pistol in his pocket. I say that if four or five persons are charged with a riot, and if one of them only is actually engaged in violence, although none of the rest engage, if they come there with one object in view, and with a manifest determination to support and assist each other, although one individual may be guilty of some greater act of violence and would be liable to a higher degree of punishment, yet all of them participate in the guilt of a riot. Thus each who came into the churchyard participating in the same design and for the purpose of mutual support, though none but Dr. Reynolds was guilty of violence, is partaker in the riot. This is sound reason and a sound principle of law, which I shall endeavor to prove. Mr. Brown tells you when he came to church in the morning he saw Dr. R. with four notices, etc., and that in the presence of Dr. R. and Mr. Cuming, the clerk took down these notices from the walls.

I wish you to attend to this, gentlemen. Remember that the clerk was an officer of the church, and what he did was an act, in a manner, of the congregation. In the presence of those persons he took down the notices which they had put up. Was not this sufficient intimation to them that it was a wrong act they were doing? It was a proof to them that what they were doing was disagreeable to the congregation.

Seeing it was offensive, they, like good citizens as it would at first appear, went away; but we find Dr. R. afterwards returned with more friends, after the clerk had taken them down.

Finding the business was offensive, he ought not to have appeared there again; but he did appear there again with a paper for signatures. I suppose by the circumstances that the cause of his going away so quietly was, that he determined to follow the advice of Mr. Clay. He had got his pistol and dirk. He therefore went back with the advice of this member of Congress in his head, and brought a loaded pistol. Now, he says, I will protect myself from all insult. We do not

find Dr. R. show that peaceable demeanor afterwards as before, but his pistol led him into violent measures. Mr. Connor, in a polite, inoffensive manner, stated to Dr. R. that it was viewed by them as an insult to the church to have those notices put up, but Dr. R. replied, he would protect himself against any insult.

What is his conduct? We do not see him behave as a peaceable citizen now. Where is this good, this quiet man? Now, he has a loaded pistol in his pocket. Thus armed, he throws the gauntlet. By this he invited insult; he puts the whole church at defiance. He says, Come on with you; I am now ready for you. He seems to have wished to be attacked, to show that he had not forgotten the lesson given him by the member of Congress. He says, I would defend myself against any insult, where not the shadow of insult had been offered to him.

When coming forward in the churchyard, where he had no right to be, he says, now I will stand my ground. Gentlemen, I wish you to observe that this ground is the special property of the congregation, it belongs as much to them as your houses belong to you. Suppose Dr. R. came to your house, either of you would say, no doubt: Sir, you have no right here. But you are not obliged to reason with him whether his conduct is right or wrong. You may say that you do not like him to come into your house, and that is sufficient. Suppose he says that he will defend himself against insult, would you not turn him out as well as you could? You would. I date all this riot from the single moment that Dr. R. threw the gauntlet to the church. He was twice warned by them, first by the clerk in pulling down the notices, and afterwards by Mr. Connor, that the congregation did not like it; and could it be supposed that the congregation would suffer themselves to be bravadoed by this man? He goes home and returns with his pistol. When he would not depart, we find the people proceeded to put him out whether he would or not. This is what any congregation would do. Is there a man amongst you but would do it if it was your church? You would do it either as Christians or as men,

and if he would not walk out quietly, you would proceed to exercise violence against him.

But was this the only act of violence committed on the part of the defendants? I have shown that it came from Dr. R., in the first instance. I will show you that he still persisted in it. When Mr. Gallagher said that no Jacobin paper (he ought to have said no paper whatever) should be put up there, Mr. Cuming immediately called Gallagher a scoundrel. Gallagher goes into the church, not with that rashness, not with the impatient party spirit which has been ascribed to him, but with the greatest prudence and decorum, and, proceeding to the priest, related to him the event. He from that moment became authorized by the legal authority which the pastor of the church gave him. The pastor did not know what had been done, nor scarcely what to do; but he directs the elders of the church, through this young man, to take measures to prevent this improper meeting. Now was not all this disturbing public worship by this kind of interruption? On his going about this church, Mr. Gallagher was discharging his duty under the direction of Mr. Neal, the pastor of the church. Reynolds caused all this interruption. When Gallagher came out of the church, it appears that he saw some persons standing quietly together with a paper. As they were quiet, he did not interfere with them. But after a short time, he saw a few persons together, and presently perceived they were engaged in a riot. He supposed it was necessary to give some assistance; he saw Dr. R. engaged on one side, and the members of the congregation on the other; he then assisted to put out Dr. R. This is the whole conduct of the young man, and yet he has been said to be the first foundation of the uproar! Gentlemen, I think that not one of you will doubt, that when a noise is made like this, when a whole neighborhood is disturbed, and when a pistol is drawn, not one of you will, can hesitate to acknowledge that a riot was bred by somebody. I will say that all these persons are actually involved with Dr. R. in producing this riot, and can there be a doubt what is your duty on this subject? Can there be a doubt but Dr. Reynolds drew his pistol with

intent to murder Mr. Gallagher? Will any persons suppose if he drew a loaded pistol, declaring he would shoot any person that insulted him, that he did not do it with intent to commit murder because he did not commit murder? If that is a fair argument, murder must always be committed, or otherwise it cannot be intended, or the intention cannot be indictable at all. Is it not to be supposed that he intended some desperate act, when he declared at the same time that he would shoot any person who should insult him? But another reason is this: He did not put this pistol in his pocket for nothing; he put it there under some bloody design; he did it strictly agreeably to the bloody instructions of his great teacher, the member of the House of Representatives of the United States; he doubtless did it with a view to execute a desperate object, to go through the business at all events.

But you have been told that all this was justifiable by the assault made on him by Mr. Gallagher. But Mr. G. was doing a lawful act—he was expressly exercising his duty. If an officer in the exercise of his duty is killed, the person who kills him is guilty of murder; but if that officer kills the person while in the unavoidable duty he is engaged in, he must be acquitted.

Gallagher had a right to put Reynolds from the ground, to execute his duty at all events; but if Reynolds had killed Gallagher, he would have been guilty of murder. So a sheriff's officer, though he makes the first attack, which by his office he is right in doing, if he is killed in the execution of that duty, the other is guilty of murder. Contrary to this doctrine, Mr. Dallas has said that Dr. Reynolds had a right to kill this young man. I say he had not, even if this had happened in a common street, much less in that churchyard, for no man can justify murder by assault. The law does not. The law says, if a man attack you by a sword, you have no right to kill him, till you have made every attempt to escape, but not in any instance to take his life, unless it be to save life, for nothing is the value of life but life. This may happen every day otherwise, and we should be drawn into a

system of legalizing bloodshed and murder, if this were the case.

I take it then, gentlemen, that in the case of Dr. Reynolds, he is without any kind of justification for his conduct; he was on the premises of another man, who had a right to put him out of it. And as to the others who tried to assist him, they were the same, because they came with the same intentions. The gentleman himself has only endeavored to controvert the force of the evidence by law, but no law can be found to justify such conduct as either of these persons was guilty of, and particularly Dr. Reynolds. From the whole force of the evidence, and the directions of the law, you can do no other than find these persons guilty, according to the indictment.

THE CHARGE TO THE JURY.

JUDGE COXE. Gentlemen of the jury: In this case, gentlemen, there has been much asperity between the gentleman who conducts the prosecution and the gentleman who defends the case. With that we have nothing to do. We have with great patience heard them make their respective attacks and retorts; but it is now our duty to turn to the narrative and entirely disregard what has been said extraneously on either side, and compare the evidence with the law. We have heard some observations about party, but I should be extremely sorry if any court in this country should ever be affected in their judgment by any party influence. I am confident, so far as regards this court, that no such influence exists. The Grand Jury have preferred two indictments, the first for riot and assault upon James Gallagher, Jr., and for a joint assault against him, leaving out the term riot. The second is a single charge against James Reynolds alone for an assault with a loaded pistol, with intent to murder. It has been said on the part of the defendants that these two indictments, being but one act, ought not to be separated, and that argument, I confess, had some weight upon my mind. But the Attorney General, stating it was agreeable to the practice of the courts of Pennsylvania, I did not choose

to make any alteration. I know that if it was against the defendant, it could do him no injury, because the question would still be open and a new trial could be had. With respect to the question of the riot on the first indictment, that is the first thing to which we will advert. It seems, gentlemen, that the question of law has been pretty well defined by the different gentlemen, although with some variation. I will endeavor to state to you as accurately as I can, my own opinion. I conceive if the parties had gone forward with the joint contemplation of doing an unlawful act, and then one had committed a more atrocious act than the others, the whole of the party must participate in the crime; or if they had lawfully assembled, and after that joined in an unlawful act, even though they assembled lawfully, it may end in a riot, though in each case none of those persons lawfully assembled are implicated in it, but only those who were actually engaged. I take the latter position to be most immediately connected with the case before us. It is not to the animadversions which have been made in the evidence that you are to look for your direction, nor are you to be guided by any first impressions that may have been made on your minds by the party views which you have been led to conceive produced the indictment.

I conceive the evidence stands fresh on your own minds, and, therefore, much observation on my part will be unnecessary. The testimony of John Brown informed you that he saw all the defendants together, and concurrent facts supported the testimony given by him. When he got up from his seat, he saw the whole four defendants at a tombstone. This appeared to be about ten minutes before the congregation came out of church. One of these gentlemen (Mr. Moore) was said to have behaved very well to the last. There is no other testimony to show that they were all there at the same time. It appeared that part of them came in the morning before service began, and were actively engaged in putting up papers calling on a certain part of the congregation to remain to sign a petition to Congress against the Alien bill. You have been informed, and it was admitted in court,

that the congregation of St. Mary's church were incorporated agreeably to the laws of the State, by which they are entitled to hold the church and ground as their own property. The question then is, whether that corporation or those persons who manage for it, have not a right to exclude any stranger from that church itself, every part of it being enclosed. It is not common property. If you should be of the opinion that they have this right to exclude persons, then certainly it was unlawful for the defendants to come and put up notices on that church, and particularly as they received the warning by the clerk pulling down the notices. The question, then, must return with more force, whether they had not a right to put them out? It is true the defendants might not have had a bad intention in those measures; but in determining the question of intention, you must observe that they returned in the yard a little before the service was closed, and that here were the whole four with papers for signatures, and pen and ink. Some of the congregation acted particularly under the order of Mr. Neal, whom several of us know, and it will not be doubted, is the minister of the church. These people warned out this assembly of persons, and if they did not go out, then it is not a question whether they had not a right to remove them. I will give my opinion that they ought to have done it, but as gently as possible, and particularly as they had superior strength.

If you should be of an opinion that the defendants came here with a view of doing an unlawful act, though one of them only might have committed that act, then there can be no kind of doubt but you can pronounce the whole of them guilty upon common law principles. If, on the other hand, you should be of opinion that there was no unlawful meeting, but that a little after the ending of the service one of them did an unlawful act, then I cannot withhold my opinion that one of them only was guilty of an unlawful act, and therefore the rest are innocent.

As to the second indictment, which is merely against James Reynolds, there can be no doubt but he did present a pistol

at J. Gallagher, but whether with intent to murder or not, you may judge by the circumstances.

It appears that there was some kind of disturbance before he presented the pistol, but whether that jostling which he received justified the act, I will not say.

I have no other observations to make on this business, as it has taken far too much time. I do not doubt but you will dispassionately weigh the circumstances with due attention, and give that verdict which the various facts related to you, dictate.

THE VERDICT.

The *Jury* retired, and in about half an hour entered with a letter, containing their verdict of *Not Guilty* as to any of the counts. Their verdict was delivered to The COURT next morning, it being ten o'clock at night, when the trial closed.

COXE, JOHN D. (1752-1824.) Admitted to bar 1776. He was Judge of the Philadelphia Court of Common Pleas from 1797 and afterwards Presiding Judge of the same. Died in Philadelphia. See Martin's Bench and Bar of Phila. Record of inscriptions in burial grounds of Christ's Church, Philadelphia: "President Judge Coxe is said by Brown—'Forum'—to have held a highly respectable position as a lawyer and a judge."—Scharff & Westcott, Hist. of Phila. II, 1531.

KEEN, REYNOLD. (1738-1800.) Born on Island of Barbadoes, but in early life settled in Philadelphia and became a leading merchant; member of Provincial Convention, 1775; suspected of disloyalty, he underwent much persecution until he succeeded in proving his loyalty, when his property was restored to him by special act of the Commissioner for State Bills of Credit, 1785; alderman of Philadelphia, 1789-1800; Associate Judge Common Pleas, 1794-1800. See Keen, G. B., Descendants of Joram Keyn. 1913.

ROBINSON, WILLIAM, JR. Appointed Associate Judge Philadelphia Common Pleas September 23, 1791. See Martin "Bench and Bar of Phila.," 54. The contemporary report gives the name "A." Robinson, but this is doubtless a mistake.

THE TRIAL OF JOHN LANGLEY FOR LARCENY AND EMBEZZLEMENT. NEW YORK CITY, 1819.

THE NARRATIVE.

One morning, in New York City, many years ago, a baker gave his youthful apprentice a basketful of cakes to go on the streets and among the neighboring houses and sell all he could, and bring back the money. But neither boy nor cakes nor basket nor money came back that night, though the boy was caught by the police a few days later just outside the city. He was indicted both for stealing, *i. e.*, larceny of the cakes and basket and likewise for embezzling them. But on the trial he was acquitted, for the Judge told the jury that to convict him of larceny they must find that at the very instant the baker gave him the basket of cakes he intended to convert them to his own use and there was no evidence of that. And the embezzlement statute expressly exempted persons under eighteen years of age and there was no evidence that the boy was older than that.

THE TRIAL.¹

In the Court of General Sessions, New York City, November, 1819.

HON. CADWALLADER D. COLDEN,² Mayor.

November 23.

The prisoner, during the term of July last, was indicted for petit larceny, at common law, and for embezzling, under the statute,³ five hundred cakes and one basket, all of the

¹ New York City Hall Recorder. See 1 Am. St. Tr. 61.

² See 1 Am. St. Tr. 6; 2 *Id.* 787, 852; 3 *Id.* 520; 4 *Id.* 545, 649; 5 *Id.* 359, 919.

³ This statute provides, that if any servant, to whom any money, goods, chattels, etc., have been by his or her master or mistress, delivered to be safely kept, shall withdraw himself, or herself, from his or her master, etc., and go away with the said money, etc., to the

value of six dollars, the property of Abraham Sater, on the 12th of June last.

Pierre C. Van Wyck,⁴ District Attorney, for the People.

John Rodman,⁵ for the prisoner.

THE EVIDENCE.

Abraham Sater testified that he was a baker in New York City; that on the 12th of last June he gave the prisoner, Langley, a basket of cakes to sell and bring back to him the money. Langley, who had been in his employ for some time, went off

with the basket of cakes, but did not return with them or with the money. He was found a few days later at Corlears Hook. The cakes or basket have not been found, nor has he been paid any money by Langley.

Mr. Rodman argued to the jury that the charges were not supported, either on the count for petit larceny or under the statute relative to embezzlement. The cakes were intrusted to the boy to sell; and there is no evidence, nor is it probable, that at the time of their delivery he intended to steal them.

COLDEN, Mayor, charged the jury, that the count in this indictment for petit larceny was not supported. The prisoner received the cakes from his master to sell, and, no doubt, did sell them. And suppose, after this, having the money in his pocket, and being induced by some or one of his idle, vicious companions, to spend the money, he did appropriate it to his own purposes, in abuse of the trust reposed in him, this would not amount to a larceny in stealing the cakes. For, to convict him of that offense, the jury must be satisfied that at the time his master intrusted him with the property, he harbored the felonious intent to convert it to his own use.

intent to steal the same, and defraud his or her master or mistress thereof, contrary to the trust and confidence reposed in him or her, by the master, etc.; or shall embezzle any money, etc., over the value of \$2.50, the said false and fraudulent act shall be adjudged a felony. But this act shall not extend to any apprentice, nor to any person within the age of eighteen years.

⁴See 4 Am. St. Tr. 547; 1 *Id.* 675, 685; 2 *Id.* 787; 3 *Id.* 520; 5 *Id.* 360 710, 920.

⁵See 1 Am. St. Tr. 826; 2 *Id.* 203, 704.

But the prisoner is indicted under a statute of this State, passed to prevent servants over the age of eighteen years, who might be intrusted by their masters with money or goods to be safely kept, from embezzling the same, contrary to the trust and confidence reposed in such servants. To bring the offender within the act, its provisions require that the servant should convert the property to his own use, with intent to steal the same; and the jury, before they can convict the prisoner under this count in the indictment, should be convinced that he intended to steal the cakes. The facts in this case, in the opinion of the Court, will not warrant that inference; and when it is considered that no testimony has been produced relative to his age, and that a rational belief cannot be entertained that he intended to steal the basket, he cannot be legally convicted.

The *Jury* acquitted the prisoner.

THE TRIAL OF JOHN JOYCE AND PETER MATHIAS FOR THE MURDER OF SARAH CROSS, PHILADELPHIA, PENN- SYLVANIA, 1808.

THE NARRATIVE.

An elderly widow named Cross lived alone in a small house on a back street in the city of Philadelphia, where she kept a little shop. A couple of negroes broke in one night, strangled her with a clothes line, rifled her money box and carried off a lot of other plunder. But a young girl from a neighboring house happened to come along just at this time to buy a stick of candy and finding the shutters closed, which was very unusual, she took a peep through the keyhole of the door before she went in. Then she pushed the door open and saw the negroes choking the old woman and collecting the plunder. She rushed out, crying murder, but the culprits escaped, only to be captured before the end of the next day. Their trial for the murder caused great excitement in the city, the court room as well as the adjoining streets and squares being crowded with the city populace. As the negroes had no counsel the Chief Justice appointed two members of the bar just of legal age, one of whom was to become the greatest financier and the other the greatest diplomat of his time. But the crime was so clearly proved that their youthful eloquence could avail nothing.¹ The jury brought in a verdict of guilty and a month later the two negroes were hanged.

¹ The reporter speaks of their efforts in glowing terms. "If a profound knowledge of the human heart, a brilliant display of forensic eloquence and a great legal knowledge would have meliorated the verdict of the jury, it would have been done; but in this dreadful transaction there was no loop to hang a doubt on. Law, humanity and self-defense had guarded every avenue to compassion; the angel of mercy hid her face in the bosom of pity and resigned to justice its victims." "Confession of Peter Mathias," Etc., Etc., *post*, p. 746.

THE TRIAL.²

In the Court of Oyer and Terminer for the City and County of Philadelphia, February, 1808.

HON. WILLIAM TILGHMAN,³ *Chief Justice.*

February. 15.

Today came on the trial of John Joyce and Peter Mathias, two black men, charged with the murder of Sarah Cross. The court room at an early hour was filled with spectators and the adjoining streets and State House yard were all day crowded with people, such appeared to be the curiosity to see the prisoners and hear the trial.

The indictment charged Joyce with being the actual perpetrator of the crime and Peter with being present aiding and abetting and assisting in it.

The prisoners on their arraignment pleaded *not guilty*.

The COURT assigned as their counsel *Mr. N. Biddle*⁴ and *Mr. Rush*.⁵

Walter Franklin, Attorney General, for the Commonwealth.

²*Bibliography.* *"The Fate of Murderers. A Faithful Narrative of the Murder of Mrs. Sarah Cross, with the Trial, Sentence and Confession of John Joyce and Peter Mathias, who were Executed near Philadelphia on Monday, March 14, 1808, Philadelphia. Printed for the Purchasers. 1808." On the front page of this pamphlet is a wood cut of the two culprits hanging from the same gallows.

*"Confession of Peter Mathias, *alias* Matthews, who was Executed on Monday, the 14th of March, 1808, for the Murder of Mrs. Sarah Cross; with an Address to the Public and People of Colour. Together with the Substance of the Trial and the Address of Chief Justice Tilghman, on his Condemnation. Philadelphia: Printed at No. 12 Walnut street, for the benefit of Bethel Church. 1808."

³TILGHMAN, WILLIAM. (1756-1827). Born Faucley, Md. His family removed to Philadelphia in 1760, where he was educated and studied law; returned to Maryland; he practiced law there for ten years and was a member of the Assembly (1788-1791), and of the Senate (1791-1793.) Removed to Philadelphia again in 1793, and was appointed a Judge of the United States Circuit Court, 1801; President of Court of Common Pleas, 1805; Chief Justice Supreme Court, 1806. Died in Philadelphia.

⁴BIDDLE, NICHOLAS. (1786-1844). Born and died in Philadelphia; member State Legislature, 1810; State Senator, 1814. He

THE WITNESSES.

The first witnesses proved that Mrs. Cross was a widow about fifty years of age. She lived in a small two-story brick house in Black Horse Alley, Philadelphia, in this city. She kept a little shop, where by care and industry she lived comfortably and had saved a little money.

Anne Messinger. Am 14 years old. About 7 o'clock of the evening of the 18th of December last, I was sent by my guardian to the house of the deceased to buy some liquorice. When I got there, I saw, contrary to custom, the window shutters closed; looked through the key-hole of the door before I went into the house. Saw Joyce, shaking Mrs. Cross by the neck; pushed the door open and went in; a candle was burning in the room; Joyce let Mrs. Cross fall, came to the door, and locked it, and put the key in his pocket; when he came to the door he held in his hand a rope, part of which appeared to be tied round the neck of Mrs. Cross; Mrs. Cross, at this time, was lying on the floor, dead, I think; Peter was in the room with Joyce; Joyce opened the drawer of the counter, and took out all the money; he then lighted another candle and went up stairs; I was terrified, tried to jump through the window, but could

not; Joyce came down stairs, but soon went up again, Peter going with him; they compelled me to go up too, and made me hold the candle, while they plundered; after having gathered up all the articles worth taking, they came down stairs, treading in their way over the body of deceased; they were preparing to go out, but hearing the sound of footsteps passing the door, they paused, and bade me put out the candles; after waiting a little while they unlocked the door and went out, Joyce holding me tight by the hand; when I got outside of the door, I screamed and cried murder; prisoners immediately ran off, dropping in the street the articles they had stolen. I was in all about half an hour in the house; the prisoners are the same men that were there. Joyce I had often seen before, knew his face well. He had been a servant in a family in Lætitia Court near Black-horse Alley, within a few doors of the house where I lived. On the day following the murder I identified them both.

Samuel Mather. Passed through Black-horse Alley the evening of the murder; saw the prisoners standing not far from deceased's house; Joyce had a stick in his hand; thought he had

was a great financier and became famous throughout the United States as the President of the United States Bank which Andrew Jackson fought and crushed.

⁵ RUSH, RICHARD. (1780-1859.) Born and died in Philadelphia. Attorney General of the United States, 1814-1817; Minister to England, 1817-1825; Secretary of the Treasury, 1825-1829; Minister to France, 1847-57; Candidate for Vice-President with President Adams. Author of "Familiar Letters of Washington," "A Residence at the Court of St. James," etc.

some criminal purpose in view; his face is familiar to me, as I knew him when he was a servant at David Kennedy's.

John Jones. Saw Peter a little before dark the evening of the murder; he had a stick which was found in the house after the murder.

Several Witnesses had seen the body of the deceased, after the prisoners had left the house. It appeared she had been strangled with a rope coiled three or four times round her neck very tight, and had been wounded and bruised on the head with a stick, or perhaps with some sharp instrument.

Other Witnesses testified that

the prisoners went to the house of Peter in Southwark, after they left the house of the deceased, and counted and displayed the booty they had brought off. Joyce was arrested the same evening. Peter was taken up the next day, a mile or two out of town in the garret of a house where he had secreted himself. Several of the stolen articles were found upon him, and he confessed that he had been at the house of the deceased the night before. A piece of rope which appeared, on comparison, to be the counterpart of that used in effecting the murder, was found, the same evening, with the prisoners.

The Prisoners offered no testimony.

The Counsel for the Prisoners said they rose in compliance with a professional duty which the Court had been pleased to devolve upon them—that they did so with embarrassment and regret, as the weight and clearness of the testimony against them constrained them to acknowledge the criminality of the prisoners. The defense, therefore, could only aim at mitigating the severity of their fate. The counsel then entered into an examination of the evidence, and endeavored to show that although it proved the homicide it did not fix upon the prisoners such a previously formed design to take away life as, under the statute of Pennsylvania, was required to warrant the punishment of death. They endeavored so to expound this statute as to show that the offense of the prisoners had not in it those ingredients of malice and premeditation which constitute murder in the first degree, but was reducible to that form of it which the law punishes with solitary confinement for 18 years.

Mr. Rush spoke one hour and a half; *Mr. Biddle* three quarters of an hour.

The *Attorney General* declared there was the fullest proof in this case of that wilful, deliberate and premeditated in-

tention to kill that constituted a murder under its most atrocious form, to show which he went through a discussion of the testimony. That the prisoners had justly forfeited their lives by the laws of their country, and could not escape its awful doom. He replied to the objections to the law of Pennsylvania, urged by the counsel for the prisoners.

The CHIEF JUSTICE told the jury the extension of mercy did not fall within their province. That if they thought the facts proved a murder in the first degree, they should say so. That it was his duty, though a painful one, to say the facts had made that impression on the mind of the Court, though it was the right of the jury exclusively to decide. He said the Act of Assembly did not make it necessary, in order to constitute a murder in the first degree, that a scheme should have been concerted long antecedent to destroy life. That if there be a perfect, complete intent to kill, formed only a minute before, it is sufficient, and such had frequently been declared by judicial authority to the meaning of the act.

THE VERDICT AND SENTENCE.

The jury retired from the box, and returned with a verdict of *murder in the first degree*, against both the prisoners.

TILGHMAN, C. J. John Joyce and Peter Mathias: You have been convicted, after an impartial trial, of an offense of the blackest dye—the only offense which by law is punished with death. You have taken that life which can never be restored, from a harmless, industrious old woman, a widow, helpless and incapable of resistance, whom it was your duty rather to have protected than to have injured. Your crime is attended with the most aggravating circumstances. Others have committed murder in the heat of passion, to revenge insults or injuries real or supposed; but you have no such excuse. Actuated by no motive but the base desire of possessing yourselves of the little property this poor woman possessed, you calmly and deliberately contrived the means of her death, you carried with you the rope which was the instrument of your abominable deed, and in her own house you knocked down and strangled her, without pity or remorse! But this was not all. You rifled her house of her money, clothing and bed; and proving yourselves utterly destitute of human feelings, you went fresh from this scene, at the bare recital of which the heart recoils, to partake of the amusement of a dance. You have injured society in general, and the people of your own color in particular, by rendering them ob-

jects of disgust and suspicion. I am happy, however, to be informed that they view your conduct with horror, and I hope they will profit by your example. I mention not these things with a view of wounding your feelings at this unhappy moment; for I consider you as objects of the greatest compassion. But it is of importance that you should be roused to a quick sense of your guilt, and of the necessity of immediate repentance.

Let no man hope to commit murder with impunity. In vain did you flatter yourselves that you were covered by the darkness of night. Before that God with whom there is no night the bloody deed appeared in full day! And in the course of his Providence, the eyes of an innocent little child were directed towards you, while you thought yourselves in perfect security. Her simple, artless story carried conviction to the minds not only of the respectable jury, who condemned you, but of the court, and the numerous audience who attended your trial. You are guilty beyond a doubt, and I exhort you to employ the short period for which you are to remain in this world in such a manner as will prove your sincere repentance. Make a full confession of your crime, and pray for forgiveness. It would be presumptuous for any man to say on what terms, or to what extent, that forgiveness is to be obtained. But we are taught by our religion to hope that to those who truly repent the mercy of God is without bounds.

It remains that I pronounce the awful judgment the law has ordained for your crime. It is this: That you, and each of you, be taken hence to the prison of the city and county of Philadelphia, from whence you came, and from thence to the place of execution; and that you be there hanged by the neck till you be dead. And may God have mercy on you!

THE CONFESSION.

The day before the execution Peter made the following confession:

I, Peter Mathias, alias Mathews (aged about 26 years), was born a slave in the family of the late Mr. John Mead, in Queen Ann's county, State of Maryland, with whom I lived till his decease, about three years ago. My father, who is a free man, is still living. My mother (who is deceased), and my uncle were pious, and often gave me good advice, to which I paid but little attention. After the death of Mr. Mead, my mistress gave me an opportunity or purchasing my liberty for 200 dollars, allowed me six years credit. I continued about a year in Queen Ann's county, and paid a part of the price of my manumission. I then went to Delaware, and hired, and built a garden for Mr. Jeremiah Register, about three miles from Dover, and continued there about four or five months, during which time I was also employed by Mr. Jonathan Hunn and his brother Ezekiel. I then went on board Staten Morris's Shallop, in which I made several trips to Wilmington and Philadelphia. I then came to this city, and hired in the family

of Doctor Rush, and stayed there only a few days. I then rented a house in George street, with Charles Fisher, and wrought about the wharves, and at the Drawbridge. I resided in George street about three months, then removed to Plumb street, to the house of Johnson; stayed there three or four months. I then rented a room of John Dolin, in Pine alley, and became acquainted with Mary Snyder and Hester Cook, and lived there about two months. From thence I removed to a house in fifth below German street, of which I rented a part of Mary Lee and Caroline Cedars, and lived there two or three weeks. I worked during the day picking oakum, and at nights playing the violin at dances. I became acquainted with John Joyce during the time I lived in John Dolin's house, about the month of September last. On the evening of the 18th of December last, having returned home from Mrs. Store's in Small street, John Joyce came to my house, which I was just about leaving with my violin having engaged to play that evening at Jenny Miller's in Pine alley. John observed, "he wanted me to go with him up to Mr. Kennedy's, to receive twenty-four dollars due him for wages." I replied, I could not go. John then said, "he would give me as much, or more than I could receive for playing, if I would accompany him." I then consented to go. John then asked for a rope, he said, "for the purpose of tying up his clothes, to carry them to his cousins." Having got the rope, John put it in his pocket, and, leaving the house, we went into Shippen street, to a shop where John bought a gill of gin, of which he drank nearly the whole himself. We then went up Front street, and got a small round stick of cord wood; we then went on to Market street. Near the wharf, John proposed to have "more drink," and went to a shop and called for a gill of gin, which he drank himself, from whence we went to Lætitia court. John looked in at Kennedy's window, saw a man who used to assist occasionally, and said, "he now had his place;" he also said, "Mr. Kennedy was not at home." I started to go to Market street. John called me and said, "here is a near way to go out," and turning into Black-horse alley, we came to the house of Mrs. Cross. John told me to "stop and come in, for he was acquainted there." We went in, and I saw Mrs. Cross standing by the counter. She entered into conversation with John, about leaving Mr. Kennedy's, and demanded the reason. John said, "he did not know, he did not choose to stay any longer, and thought he could suit himself better." Mrs. Cross replied, "that she thought it was as good a place as he could get." She asked me to come to the stove and warm myself. I replied it was not cold, but went to the stove and put up my foot. John called for some apples, and gave me one. Some short time after I asked John whether he would go; he replied, "directly." After tarrying a while, I asked him again, on which John said, "what is your hurry." I then went out of the door, bidding Mrs. Cross good-bye, telling John to come along, as it was time enough to go where I intended (meaning the engagement to play for the dance). He said, "he would come directly." Mrs. Cross said to

John, "why do you not go with the man?" Leaving the door open I went to Second street corner; waited there some time, and then went to see whether John intended to go or not. On returning to the house, I found the door locked, lifted the latch and called to John, and asked him whether he would go or not. He answered, "he would go directly. Stop," said he, "come in." I then opened the door and went in. At this time there was no light below. I did not see Mrs. Cross until John lighted a candle.

At this time a little girl came in and asked for something out of the shop. Then John went to the door, locked it, and put the key in his pocket. I then saw Mrs. Cross laying on the floor. I asked John what he was about, and whether he had killed the woman. He replied: "No, she is not dead;" but he swore "he would have his money and property, and that she had more than two hundred dollars of his money." I then told him this was not the way to act, and asked him to let me out of the house. He swore "he would not, until he got his property." He took the candle in his hand and asked the girl whether she knew him. She said "no." He then told me and the little girl to come up-stairs with him, which we did. In going up I saw a bed partly tied up, which John wished me to assist in tying up, saying, "it belonged to him," and pointing to another bed, said, "that was not his." I said I did not wish to have anything to do with the business, and could not help him, as my arm was lame. He insisted on my helping him, but I replied I could not. After the bed was tied up, John pushed it down-stairs. I and the little girl came down, she carrying the bundle. I then saw Mrs. Cross lying, partly covered over, saw a rope leading from the body towards the front door. John, on coming down-stairs, had a bundle of clothes and a looking-glass tied up with them. I asked him, have you killed this woman? He replied, "don't be a d—n'd fool! No, I have not!" I then asked him to let me and the girl out. He replied, "I shall not let the little girl go out at all." I then said, yes, she shall go out. John replied, "she should not, for he would lock her up in the house, and told her so." He, however, unlocked the door. I then gave John the bundle, and came out of the house first; the girl followed with John. I went alone to the corner of Second street, and was proceeding towards Market street, when I heard the girl cry murder. John overtook me in Market above Second street, and gave me the bundle to carry, proceeded to Fifth street, and down Fifth street to my house. On the way I said to John, Lord have mercy on me! John, have you killed that woman? He replied, "he believed he had." On repeating the question, he said, "he had killed her, he had knocked her down, and she was dead as hell!" I then said to John, what do you think of yourself? He said "he did not know, he had done it, and it was done." I then asked him if he thought he would escape, to which he replied, "yes, by God." I then said, "I don't think you will." John said "he should escape, if I did not betray him." I observed I did not know how it would be, but if called upon I should tell the truth; to which John replied, "I was a d—n'd

fool." After getting home we found Hester Cook below, sat down, and I gave the bundle of clothes to Hester Cook. Two women, Caroline Ceders and Mary Lee, came downstairs. John then proposed to have some drink, and gave a quarter of a dollar and eleven pence, and Hester Cook bought a quart of brandy. John then pulled out of his pocket two purses of money, which he put on the table, requesting me to count it, which I did. They contained about fifty-eight dollars. I gave them to him again, asked whether he got that money at Mrs. Cross's. He said, "no." John then took some more money out of his pocket, some gold pieces, and small silver. I did not know how much. John took the money which I had counted, and gave it, together with the clothes, to Hester Cook, to take care of till he returned. This was about 8 o'clock in the evening. I went to Jenny Miller's in Pine alley, where I had been engaged to play that evening. The company had not met there. I then went to a house next to Mrs. Jordan's, where there was a dance, and continued there some time; from thence I went to Peggy Tuckers in Fourth street, where there was also a dance, found John there, and conversed with him. Hester Cook came there after John, and offered to find him a bed. He said, "he would go directly." She also told me "that the constables had been inquiring for me, respecting an apprentice boy."

But a short time elapsed before the watchman came in and apprehended both of us, charged us with murder. I told them I had killed nobody, and the woman asserting, "that I had been there all the evening," they let me go, and I went home. Hester Cook took the trunk, containing the money and clothes, to carry it to her aunt's (Rebecca Brunswick), on the banks of Schuylkill. I accompanied her late at night.

About 11 o'clock next day I was apprehended there, by Mr. Smith and others, and brought to prison.

THE EXECUTIONS.

March 14.

Both of the convicted men were hanged to-day on the same gallows. The pamphlet which was issued for the benefit of Bethel Church,^a has the following description of the taking off of Peter Mathias:

"About 10 o'clock he was brought out of prison, and walked to the place of execution, singing hymns, attended by the following clergymen, viz.: Rev. Dr. Staughton, Rev. Seely Bunn, Rev. Thos. Dunn, Rev. Richard Allen, and Jeffery Beulah. He seemed cheerful all the way to the place of execution, frequently expressing his hopes and expectations of being shortly received in the world of bliss. At the gallows he still seemed doubtless of his acceptance

^a*Ante,*

through the atoning blood of Christ. He there requested that the audience should be informed that the confession he had made, (which was in the hands of Mr. Allen), was a true confession, and he wanted no alteration to be made.

Also, that he had hopes of happiness beyond the grave; and had no enmity in his heart against the witnesses, or any other person, but freely forgave all. He expressed his gratitude to the sheriff, coroner, keeper and others, for the kindness and attention that had been shown him during his imprisonment. He had confirmed his confession in the presence of the sheriff and coroner, between 9 and 10 o'clock the night before his execution, as he did under the gallows."

THE TRIAL OF EPHRAIM GILMAN FOR THE MURDER OF HARRIET B. SWAN, PARIS, MAINE, 1862.

THE NARRATIVE.

Mrs. Harriet Swan was a widow forty years of age, who lived on a farm with her six children, the eldest, Abba, a girl of sixteen. Ephraim Gilman, a farmhand, had since the husband's death, managed the place on shares and lived in the house. Early one Monday morning Gilman came to the house of a neighbor, Mrs. Richardson, and asked her to go down to the Swan farm, as Mrs. Swan had killed herself. She and her husband hastened to the place and found Mrs. Swan in bed with two young children, dead. The bed clothes were smoothly covering her body and wrapped around her neck was a silk and worsted scarf. This had left no mark on the neck, but spots there which might have been made by another's hand were visible. Going into the next room, Mrs. Richardson found a piece of paper on which was written, very badly both in writing and spelling, the words, "be good, children, for I am tired of being in this world."

For the young girl, Abba, Gilman had formed an attachment and had asked her to marry him, which she refused. The mother was also very much opposed to the match and a few weeks before, to get her out of his way, had sent the girl to some friends more than a mile away, to work in their household. Gilman resented this very bitterly, as there was a young man there whom he regarded as a rival and he had made threats of mischief. He was charged with the murder, and at the preliminary examination made a long statement in which he denied any knowledge of the death; said that after going out that morning to milk the cows he called to Mrs. Swan, but getting no answer went into her bedroom and found her dead, just as described by Mrs. Richardson. He admitted that the scarf which was tied around her neck was his.

On the trial the weight of medical testimony was that the woman could not have strangled herself with the scarf, but that someone had choked her to death. And the note found in the next room was proved to have been written by the prisoner. He was found guilty and sentenced to imprisonment for life.

THE TRIAL.¹

In the Supreme Judicial Court, Paris, Maine, March, 1862.

HON. DANIEL J. GOODENOW,² Judge.

August 9, 1861.

At the August term, 1861, of the Supreme Judicial Court of Maine, held at Paris, in the County of Oxford, an indictment was returned by the Grand Jury that

Ephraim Gilman, of Fryeburg, in said County of Oxford, laborer, on the 17th day of June last past, with force and arms, at Fryeburg aforesaid, in the county aforesaid, in and upon one Harriet B. Swan, in the peace of the said State then and there being, feloniously, wilfully, and of his express malice aforethought, did make an assault, and that the said Ephraim Gilman, with both his hands about the neck and throat of her the said Harriet B. Swan, then and there feloniously, wilfully and of his express malice aforethought, did fix and fasten, and that the said Ephraim Gilman, with both his hands so as aforesaid fixed and fastened about the neck and throat of her the said Harriet B. Swan, her the said Harriet B. Swan, then and there feloniously, wilfully, and of his express malice aforethought, did choke and strangle; of which said choking and strangling she the said Harriet B. Swan then and there instantly died. And the jurors aforesaid upon their oaths aforesaid do say, that the said Ephraim Gilman, her the said Harriet B. Swan, then and there in manner and form aforesaid, feloniously, wilfully, and of his express malice aforethought, did kill and murder, against the peace of said State, and contrary to the form of the statute in such case made and provided.

¹*Bibliography.* *"Report of the case of Ephraim Gilman, indicted for the murder of Mrs. Harriet B. Swan, before the Supreme Judicial Court of Maine, including the arguments before the Law Court upon the exceptions, and the opinion of the Court. Portland: Stephen Berry, Printer."

²GOODENOW, DANIEL J. (1793-1863.) Born Henniker, N. H. Practiced law at Alfred, Me.; member State Legislature, 1827-1830; Speaker, 1830; Attorney General, 1830-1841; Judge District Court, 1841-1848; Judge Supreme Court, 1855-1863.

Today the *Prisoner* was arraigned and pleaded *Not Guilty*. and, at his request, the case was continued.

At the November Term, it was alleged and proved to the satisfaction of the presiding Judge, that the prisoner was too ill to proceed to trial, and the case was again continued, until the third Wednesday in March.

March 19, 1863.

The JUDGE took his seat at 9 A. M. and ordered the prisoner to be placed at the bar, which was done.

*Joseph H. Drummond*³ and *William W. Virgin*,⁴ for the State.

E. W. Wedgewood and *Henry Hyde Smith*,⁵ for the Prisoner.

The *Clerk* called the jurors, to whom the following questions were put by the *Attorney General*:

Are you related to the deceased or the prisoner? Have you formed or expressed any opinion in the case? Are you sensible of any bias or prejudice either for or against the prisoner? Have you any conscientious scruples which would prevent you from finding the prisoner guilty of a crime punishable with death, if the evidence satisfies you he is guilty?

Samuel Charles had formed an opinion and was set aside, and Hosea Auston, Atwood B. Bumpus, Leonard A. Berry, John D. Gossam and Peter Hardy were challenged peremptorily.

The foregoing questions being put to each of the follow-

³DRUMMOND, JOSEPH HAYDEN. (1827-1902). Attorney General of Maine for many years and author of *Maine Masonic Text-book: History of Masonic Jurisprudence and Under the King*. Died in Portland.

⁴VIRGIN WILLIAM WIRT. (1823-1893.) Born, Rumford, Me. Leading member of the Maine bar for many years; Associate Justice Supreme Court of Maine; author of *Maine Court Officer*; *Digest of Supreme Court Decisions*. Reporter of Supreme Court. Died in Portland.

⁵SMITH, HENRY HYDE. (1832-1912). Born, Cornish, Me. A. M. Bowdoin, 1857; LL.B., Harvard, 1860; teacher Fryeburg, Me., and Cedarville, Ohio, 1854-1856; Principal Fryeburg Academy, 1856-1858; Practiced law Portland, Me., 1860-1861, Fryeburg, 1861-1867, Boston, Mass., 1867-1912; Master in Chancery, 1881. See Hist. Bowdoin Coll: Am. Bar Assn. Rep. 1913.

ing, they were sworn to sit in the case, having answered all the questions in the negative.

The *Jury* was made up as follows, viz.: Seth T. Holbrook, Oxford, Foreman; Jairus K. Hammond, Paris; John Akers, Andover; Orville Bridgham, Buckfield; John A. Bolster, Norway; William Chase, Buckfield; Stephen Danforth, Porter; Caleb Fuller, Woodstock; William Frost, 3rd, Norway; Alvin B. Godwin, Rumford; Josiah Hutchinson, Buckfield; Calvin B. Keene, Sumner.

At the suggestion of the *Attorney General*, the Jurors were allowed a few minutes to send messages to their families, etc. The *Clerk* read the indictment to the jury.

MR. VIRGIN'S OPENING.

Mr. Virgin. Gentlemen of the jury. We have just witnessed a scene which is very unusual in this courtroom. The critical and cautious manner of filling the panel, the administration of the peculiar oath, and the significant words of caution are solemnities peculiar to this occasion. And to complete the preliminaries of the scene, there falls upon the jury thus impanelled, the shadow of a young man, charged by the Grand Jury of this, his own county, with being a wilful murderer.

Notwithstanding it was only six months since that my official duty compelled me to stand here and present to another jury a similar case, yet those of us (and doubtless it includes us all) who have any pride in the moral condition of the county, have the consolation of knowing that that was the first case of the kind ever tried in this county. May we be indulged in the well grounded hope that this shall be the last case of this nature that a jury of Oxford county shall ever be impanelled to try.

If, as we all believe, it is a dreadful thing to commit the crime of murder, the responsibility of trying the murderer is fully commensurate with the magnitude and enormity of the crime. What a tax, then, upon the patience, the perseverance, the intelligence, the candor and strict integrity of each one of us who is officially connected with this most important investigation, stern duty imposes!

But there is not so much difficulty in understanding, as in performing our respective duties. For the law has, with great precision, distinctly laid out the paths for each one of us to travel in; and they are well beaten paths, too, for they have been trodden by courts, jurors and counsel for centuries. And if we shall succeed in keeping within those old, time-honored beats, our duties, at the close of this trial, will have been well done, inasmuch as they will have been legally done.

In one sense, the duty of each and all of us is the same; for the trial of criminal cases is unlike that of civil in more particulars than one. Here, we do not see two parties, each striving by all honorable means at least to obtain a verdict. The whole end and aim of the Government is to lay before the Court and jury every known material fact that has come within its knowledge after the most serious and careful search, regardless of what such facts may prove; and then by applying the old, wise, salutary principles of law, assist the jury in arriving at the simple, plain, truthful result. So that in one view we are all counsel for the prisoner. For while his special counsel will stand here and perseveringly and untiringly urge every fair, legal and honorable consideration in his behalf; while the Court, with his vast and learned experience, will sit here and patiently and impartially protect the prisoner in every legal right; and while you will not only not close your minds to anything which can be properly said or done for the prisoner, but will keep them sensitively alive to duty, weigh every material fact in the case; neither will the counsel for the Government urge upon you the prisoner's conviction by any unfair, illegal or questionable means. For while the law makes you the jury to find the verdict according to the evidence, and not in accordance with caprice or prejudice, it also makes the representatives of the Government simply prosecutors, and in no wise persecutors. But while, in the language of Burke, we shall not intend to be derelict in our duty, by losing the zeal and spirit properly belonging to our position, neither shall we overdo our duty by not comporting ourselves with such temper and decorum

as would ill become the final verdict, had the law rested the final judgment of this case with us.

That the statement is not simply theoretical, was demonstrated only a few weeks since, at the last capital trial in this State, in York county. After the evidence for the Government had been all put in, the Attorney General, now present, took the responsibility to enter a *nol pros.*, not deeming the evidence sufficient to warrant a conviction. And, gentlemen, when the Government shall have stopped in this case, if the evidence, in his good judgment, shall warrant a similar proceeding, I assure you it will be done with the greatest pleasure.

But while the prisoner must and will have every shadow of his rights preserved, while we know you will not convict him of the crime charged unless the evidence shall produce in your minds an "abiding conviction, to a moral certainty," of his guilt, and while we would not have you convict him short of the requisite evidence if we could, you must not forget that the prisoner is only one of the community, each and all of whom have their rights, and that among those rights is the right of life. If you shall find, in accordance with the law, that another of the community has been violently robbed of her life by the prisoner, we have the right to believe that you have manhood enough to say so by your verdict. To such a verdict, under such circumstances, your characters as men no less than your oaths as jurors have been pledged to the community in which you dwell and of which you form a part, and to Him whose aid you have solemnly invoked.

You are also to recollect that you ought not to yield your judgments to the appeals to sympathy on either hand. The fact that the prisoner has innocent friends who grieve for his sad misfortune, neither increases nor diminishes his guilt in the least; for herein he is like every other prisoner charged with crime. The vagabond never traveled this earth, so vile, who had no friend to mourn over his downfall.

Neither should the wail of orphanage that comes up from the dead-house yonder, as if beseeching the spirit of a murdered widowed mother to save her children from the icy

grasp of the cold charity of the world upon which they have been so unceremoniously and cruelly thrown, have any legal weight upon your judgments, as to the guilt or innocence of the prisoner. Our hearts may properly listen to such appeals, because for such our hearts were made, and they may be keenly alive to the wants of the innocent and distressed, everywhere. But your judgments, as jurors, have no such jurisdiction. So that how much soever you may feel for the innocent friends of the accused, how fervently soever you may implore the good God to bind up the bruised heart, you will have the consolation of knowing that it is not the justice which your duties may call upon you to dispense to the criminal that lacerates the hearts of his friends, but his own voluntary, damning guilt!

Then, gentlemen, to borrow a figure, let your judgments be like a mirror which shall reflect in your verdict the combined image of the law and evidence submitted to you. And see to it, I pray you. that no foul breath shall dim its fair surface, so that it may reflect either an image that shall be flattering to the criminal, or a caricature of justice.

But, gentlemen, without spending any more time upon such general suggestions, let me invite your attention to the specific constitutional and legal principles in accordance with which this case has so far progressed and which are to govern us in its future investigation.

The principles of law governing capital cases are quite numerous but simple, and all of them protective to prisoners. And if you have never had occasion to examine them in detail, but will permit your minds to briefly run over them with mine, you will be surprised at the humane wisdom displayed in the construction of that perfect "cordon of fortifications" which the constitution and laws of this State have so humanely thrown around the prisoner set at the bar to be tried upon the charge of a capital crime; and you will undoubtedly conclude with me that there is no possible chance for an innocent man to be convicted, unless through some unpardonable dereliction of some one officially connected with the trial. To borrow a figure from the spirit of the times, Gibraltar, with

all its vast resources of defense, is not so thoroughly physically defensive as are the constitution and laws morally to an innocent prisoner. These legal principles bristle all around him, and have no weak side; but they are so omnipresent, as it were, that they leave no conceivable avenue for error to successfully attack him, unless through the treason of some one or more of the guard. And, gentlemen, you constitute the main guard, while counsel on either side are but the pickets. Our several oaths of office are our respective oaths of allegiance to the prisoner and the community. Let us see to it that no strange fact shall pass us without proper challenge and examination.

Let us then take the prisoner, first, when he is simply suspected of the crime committed, and see how many critical obstructions stand between him and a verdict of guilty legally obtained through a jury of his country.

The first principle which we meet is in the first article of the Constitution, viz:—"No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a Grand Jury." The statute then steps in and declares that no indictment can be found, unless, of the number of Grand Jurors, all of whom have solemnly taken the oath that they "will present no man for envy, hatred or malice but will present things truly as they come to their knowledge, according to the best of their understanding," twelve concur in agreeing that the particular indictment shall be found.

We next meet with the constitutional provision declaring that the prisoner "may demand the nature and cause of the accusation, and have a copy thereof." Then appears the common law and persistently insists that the indictment, in order to compel an answer from the prisoner, "must contain all that is material to constitute a crime, set forth with precision, and in the customary forms of law," which is so pregnant with meaning that the books are laden with the history of indictments which have split upon this rock. Without stopping to discuss in detail this principle of technical precision so indispensable to indictments, and the consequent

conviction of persons therein charged, I will dismiss it with the general remark that on and around this reef the wrecks of more indictments can be found than throughout the remainder of the whole vast area of criminal jurisprudence.

Well, gentlemen, the indictment having been properly found, the person charged becomes a prisoner and is held to answer the charge set forth as I have mentioned.

He is arraigned by having the indictment read to him; when without being obliged to specify, as in civil cases, what his particular defense may be; he simply pleads that he is "not guilty." By hearing the indictment read, he learns what the charge is. But through fear that he may not understand the technicalities of the law therein expressed, the statute again comes to his relief, and instructs the Court to assign counsel for the prisoner. And the Court, to carry out the humane spirit of the law, takes care always to assign one or more of the most eminent counsel in the community.

Now it is that the clerk, in accordance with the statute, furnishes the prisoner, free of expense to him, with a copy of the indictment, together with a list of witnesses who appeared before the Grand Jury against him.

If he is ready for the trial, he may have it; for the constitution expressly declares that "he shall have a speedy, public and impartial trial, by a jury of the vicinity." Then, in order that he may not be taken by surprise before his defense is prepared, the statute instructs the Court to assign a time for the trial. It then furnishes him with "compulsory process" for obtaining witnesses in his favor, and that, too, at the expense of the State, and at the same time puts into his hand a list of all the jurors returned, from which the twelve are to be selected who are to try him.

The time has arrived for the trial, and he comes in to attend to the selection of the individual men who are to "try the issue between the State," in whose name the accusation is made, and himself. He has had a list of the jurors arranged, not as the Government counsel might desire, if they had any particular motive in having certain ones selected, but on account of its fairness, alphabetically. He has had

time to inquire into the character and intelligence of every juror upon the list, and has thus become prepared to act understandingly in the selection of the jury. And in this responsible proceeding, as in all others connected with his trial, the constitution comes and declares that "he may be heard by himself and counsel, or by either."

In the selection of the men to serve upon the panel, you have just witnessed how different are a prisoner's rights from those of a party in a civil suit; and I need not call your attention to the extreme care with which the law assists him in obtaining an impartial jury.

The jury having been duly impanelled, the Government is bound to lay open to him and his able counsel the whole case against him by stating it, in their hearing, to the jury. Then the facts cannot be proved, as in civil cases, by the depositions of witnesses whom the jury have never seen, but by living witnesses upon the stand; for the constitution has very wisely provided that in the trial of all criminal cases the prisoner shall be "confronted by the witnesses against him," who must personally appear and testify in his presence.

There, gentlemen, we have arrived at the very point at which we find this case at the present time.

Now, we come to the principles of law which govern the crime of murder, the nature of the evidence by which it must be proved, together with the amount of evidence indispensably necessary to warrant conviction. And as we proceed, continue to notice with what caution the prisoner is guarded against the opportunity of error's injuring him.

Homicide is unlike suicide in this: that while each involves the death of a human being, suicide is the killing of one's self, while homicide is the killing of one human being by another. In England, both were crimes punishable by law, while, in this country, homicide alone is punishable.

There are two kinds of homicide, lawful and unlawful. It is lawful when committed under circumstances so unlike those of the present case, that it does not become necessary to discuss the nature of it at the present time. And I may as well remark here that in stating to you the law, I shall

confine myself to this case, and not discuss the law of any other cases. Unlawful homicide is either murder or manslaughter. With manslaughter we have nothing to do at this time; for if the prisoner killed Mrs. Swan, it will not be pretended that the killing was simply manslaughter.

Murder is of two degrees, involving two different grades of criminality, to-wit: murder of the first degree, and murder of the second degree. With murder of the second degree we shall have no occasion to trouble ourselves; because there is not a fact within our knowledge that has any tendency to prove that this case can come under that head. The remaining question then is, what is murder of the first degree?

Our Revised Statutes define murder the same as it has been defined in the books for centuries, viz.: "Whoever shall unlawfully kill any human being, with malice aforethought, either express or implied, shall be deemed guilty of murder." That is murder. But to constitute murder in the first degree, we find on reading the same statute, that "whoever shall commit murder with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death, or imprisonment in the State Prison for life, or for an unlimited term of years, shall be deemed guilty of murder in the first degree." So that murder in the first degree can be committed under any one species of four different kinds of circumstances, to-wit: 1. By committing murder with express malice aforethought; 2. By committing murder in perpetrating, or attempting to perpetrate, any crime punishable with death, as arson; 3. By committing murder in perpetrating, or attempting to perpetrate, any crime punishable with imprisonment in the State Prison for life, as rape; and 4. By committing murder in perpetrating, or attempting to perpetrate, any crime punishable with imprisonment in the State Prison for an unlimited term of years, as perjury in capital cases, and robbery.

Now, by blending the two definitions of murder and murder of the first degree, we arrive at a correct expression of what constitutes murder in the first degree, viz.: Whoever

shall unlawfully kill any human being with express malice aforethought or in perpetrating, or attempting to perpetrate any crime punishable with death, or imprisonment in the State Prison for life, or for an unlimited term of years, shall be guilty of murder of the first degree.

But the Government will contend that the murder in this case was committed under the first state of facts, which may be expressed simply as follows: Whoever shall unlawfully kill any human being with express malice aforethought, shall be guilty of murder of the first degree.

Now to a proper understanding of the crime thus expressed. Let us for a moment examine the language and learn what we mean when we make use of such language.

We find the expression contains two propositions, viz.: 1. The unlawful killing of a human being; and 2, With express malice aforethought.

1. To kill a person unlawfully, is to kill him without justifiable cause or reasonable excuse. I need not discuss this proposition further, since if the killing be proved, it will not be denied that it was unlawful.

2. Malice, in the general acceptation of the word, every one knows means ill will, hatred, spite, a spirit of revenge. But malice in law, or legal malice, is unlike that passion as commonly expressed, in this; that while it means all that malice is generally understood to mean, it also means "a disposition to injure others without cause, and covers all wrongful and wicked acts intentionally and deliberately done without just cause or excuse." So that malice may be proved, notwithstanding the evidence should show that the prisoner was not influenced by any feeling of ill will toward the murdered person, if it appear that the killing was intentionally and deliberately done.

Express malice is proved by the circumstances oftentimes. If I should express by word of mouth a deliberately formed intention of killing another, and should immediately execute such intention, it would not any more strongly prove express malice, than without saying a word, I should seize an axe

and, without provocation, split him down; for how often do "acts speak louder than words."

Among the first things that we learn as we emerge from our helpless infancy, are the little laws of nature which govern things round about us. If we place our fingers in too close proximity with the fire, we soon suffer the penalty which instructs us to keep at a proper distance from the burning element. So that when we arrive at the years of discretion, we have learned by experience and observation (and our observation is another's experience), the relation which exists between cause and effect.

Now, the law is founded on sound philosophy, and declares, by reasoning backward from effect to cause, that since certain effects or results naturally and ordinarily flow from certain corresponding causes, a man shall be supposed or presumed to intend to do that which is the ordinary and natural result of his own purposed act. Thus, Mr. Foreman, if I should seize a musket and shoot you through the heart, the ordinary and natural result of such an act would be your death; and hence the law would justly presume that I intended to kill you. And this is one of the modes by which the law ascertains the intention; and when a wicked act is intentionally done, it is considered to have been maliciously done, in a legal sense. Hence, when the Government has proved that a prisoner has unlawfully killed a human being and that he did it deliberately and intentionally, it has proved murder of the first degree, since malice aforethought simply means premeditated.

So much for the law of murder.

A continuance of your attention will enable me soon to close all I desire to say in regard to the legal principles involved, the remaining ones being those applicable to the amount and kind of evidence to be adduced in the trial.

The amount of evidence necessary to warrant a conviction in criminal cases is another of the great marked characteristics which distinguish the trials of criminal cases from those of civil. In civil cases which you have tried at the present term, your duty has been defined as consisting in finding for the "party in whose favor the evidence preponderates,

although it be not free from reasonable doubt." And such is the law. But in criminal trials, the guilt of the prisoner must be fully proved; or, in the language of the law, every material fact must be proved beyond all reasonable doubt. What constitutes "reasonable doubt" has been discussed by all writers on criminal law, and probably no criminal case of any magnitude has been tried for a hundred years in any enlightened country, but that has elicited from counsel and court more or less of the discussion of this one principle. But I will trouble you with only two authorities.^a

These elucidations of the subject are from two of the most eminent legal minds in this country, and to very refined metaphysicians no doubt these explanations are very satisfactory. But into my darkened understanding I must acknowledge they throw not much light; for after all they come back to the simple words themselves, which every one understands, and the meaning of which cannot be rendered any more simple. For if any fact is proved to my reasonable satisfaction, I can give the reason which convinces me. If I have a reasonable doubt, I ought to be able to give the reason why I doubt, for if I can give no such reason, the doubt is not a reasonable one.

Facts are proved by evidence, which is of two kinds, to-wit: direct, and circumstantial. In regard to direct evidence, I will spend no time. The term circumstantial, from its etymology, means standing about or around. Hence when we speak of circumstantial facts, we mean facts which stand around or about some main fact to be proved, and hence more or less indirectly connected with it. This kind of evidence is admissible in all cases. We often hear it attacked as unsafe, by the defense in criminal cases, as we often hear the characters of unimpeachable witnesses attacked in similar cases. But circumstantial evidence has furnished many a prisoner a true deliverance from the meshes of direct but perjured evidence. It is often said that circumstantial evidence is unreliable because innocent persons have been con-

^a*Mr. Virgin* here read from 3rd Vol. Greenl. on Ev. and from Chief Justice Shaw's charge in Webster's Case, 4 Am. St. Tr.

victed by it. But for every innocent person convicted by means of circumstantial evidence, the books contain the record of five innocent persons convicted by the direct evidence of perjured witnesses.

Circumstantial evidence is the great test of direct evidence to the cross-examiner, because its truthfulness is sustained by the laws of nature. It has always been considered the most convincing, when properly weighed and connected with the main fact around which it stands. You all recollect the first notable instance, I mean that mentioned in the Holy Record. When two of John's disciples waited upon the Saviour of the world, and inquired whether Jesus was "he that should come," He did not reply by giving a direct affirmative answer; for He knew that any imposter could say as much! But he told them to "go and shew John those things which ye do hear and see; the blind receive their sight, the lame walk, the lepers are cleansed, and the deaf hear, the dead are raised up, and the poor have the gospel preached to them!" What incredulity could withstand such an array of circumstantial evidence or things?

The deceased, Mrs. Harriet B. Swan, was a widow, of about 40 years of age. Her husband had died about two years before her death, at his little farm in Fryeburg, about two miles from Fryeburg village, leaving a widow and six children, the oldest about 15, and the youngest an infant. For two years the prisoner had leased the farm of Mrs. Swan, carrying it on at the halves (as it is sometimes called), and boarding in her family. On Sunday, the 17th of June, the last day of her life, Mrs. S. attended church at Fryeburg village, going and returning with one of her neighbors. She was in the best spirits, as usual. About 7 P. M., a neighbor called at the house, and spent an hour in friendly, neighborly conversation, she exhibiting unusually good spirits. About 8 P. M. the prisoner returned home with a horse and wagon, did the chores and came into the house before the neighbor left. Prisoner and neighbor went up to the cornfield together, and finally the neighbor left for home, about a mile distant, leaving prisoner, Mrs. Swan, and three children, of

the respective ages of 9, 6 and 2 years. This is the last information we have of Mrs. S. alive, except from prisoner himself. And as his declarations were made under the sanction of an oath before the coroner's jury, and as I understand its introduction will be objected to by the defense, I will not allude to it at this time.

The next morning, about 4 1-2 o'clock, the prisoner was first seen at Mrs. S.'s brother's, about two miles from Mrs. S.'s, with a horse and wagon, informing the brother that he had come after a pig which the brother had sold Mrs. S. Prisoner soon obtained the pig and turned back towards home. He is next seen at the house of Mrs. Richardson, the nearest neighbor of Mrs. S., a quarter of a mile distant, about 5 1-2 o'clock A. M. He informed Mrs. R. that Mrs. S. had killed herself, and he requested her to go down to the house. Mrs. R. and her husband hastened down to Mrs. S.'s, and found Mrs. S. lying on her right side in her bed, on the front side of the bed facing the wall. The girl of 9, and the boy of 2 years, were in the same bed, the former on the extreme back side of the bed, dressing herself, and crying, while the latter was lying in the bed beside the dead body of her mother, apparently without realizing that her mother was dead.

The bed clothes were smoothly covering the dead body of Mrs. S., even up over her shoulder. The body lay in an easy, natural position, with the right arm extended at full length across the head of the bed, while the left was bent at the elbow at about a right angle, with her left hand holding both ends of a silk and worsted scarf a little more than a yard in length. The scarf was once around the neck of Mrs. S., crossing on the back part of the neck, not tied, with the ends resting in her left hand as before mentioned. The head lay upon the pillow, turned a little backward with the face turned a little downward toward the pillow. Mrs. R., upon seeing the scarf, immediately pulled one end from the hand and loosened it about the neck, without disturbing the other end. She then rubbed the right arm, but found it cold. She then raised the bed clothes, extended her hand

upon the body and found that cold. Finding Mrs. S. was dead, she let the bed clothes down upon the body again as she found them. She also saw the protruding eyes and tongue, the swollen face, etc., all of which will be minutely described to you by the examining physicians. Other neighbors soon came in and witnessed the same scene, when one or more was selected to guard the body and its surroundings in order that a coroner's jury might be summoned and see for themselves the same things and in the same conditions and positions in which they were first found. Preparations were soon made for a coroner's inquest, and I, being then County Attorney, was notified to attend in accordance with the statute. Knowing how necessary a critical post mortem examination is under such circumstances, I employed Dr. T. H. Brown, of Paris, to go with me. We arrived before any *post mortem* examination had been attempted, when Drs. Brown, Towle and Lamson made a critical examination of every cavity of the body, and will minutely describe the appearances and their conclusions in the premises. Up to the time of summoning the coroner's jury, nothing but suicide was suspected.

Upon the pillow case, eighteen inches behind the head, was seen a stain one and a half inches in diameter, evidently bloody mucus which had oozed from the mouth after decease. On removing the body from the bed, a similar stain was found on the pillow case immediately under the place where the mouth was found. On the sheet immediately under the pelvis was another stain, of about the size of a silver dollar, evidently catamenial. Upon removing the bed clothes covering the body, a fold in the upper sheet lay under the left foot, showing that the body had been turned over. The lower limbs were gently flexed, but bearing no evidence of convulsion, or anything of the kind.

The cavities of the body showed unmistakable evidences that death had been caused by strangulation. And the question to be solved was, was it suicidal or homicidal strangulation. Upon examining the neck and throat, the following facts were discovered: The scarf had left no indentation

upon any portion of the neck. There was not even any discoloration that could be caused by the scarf, because the discolored spots were not upon the prominent parts of the neck, across the muscles, or on the back of the neck where the scarf would have pressed with most force, but they were on the soft parts between the prominent muscles, and on each side. And, gentlemen, there were the plain marks of a thumb and fingers of somebody's right hand, evidenced by the discolored spots, and the nail-marks! This right hand had evidently caused the death by strangulation. Could Mrs. S. thus strangle herself? The physicians all declared it to be a physiological impossibility. The books all sustain them. The scarf was put there, then, to mislead the examiners, and cover the crime! Who, then, was the murderer?

Men act from motives. Who had the motive? Inquiry was on the alert. The following facts led to its necessary conclusion.

Mrs. Swan's oldest child was a daughter, Abba, of 16 or 17 years. She had lived at home with her mother, until some two weeks before her mother's death, when she went to work at a Mrs. Evans's, who lived about a mile from Mrs. S.

For Abba the prisoner had formed a most devoted attachment. He had frequently pressed his claims upon her, and urged her to marry with him. And when he learned that Mrs. E. had applied to Abba to keep house for her while she spent a week or two in Cambridge, the prisoner demurred, fearing that he might find a rival in the very promising son of Mrs. E. But not until the morning when Abba asked the prisoner to harness the horse and carry her over to Mrs. E.'s, did he fully vent his jealousy. Then it was he informed her "he should rather carry her to her grave!"

While residing at Mrs. E.'s, the prisoner was frequently importuning her to return to her mother's, while she as frequently informed him that she could not return until Mrs. E. did. The prisoner was at Mrs. E.'s frequently, and what he saw to confirm his fears we know not, but we do know that

"Trifles, light as air, are to the jealous
Confirmations strong as proofs from holy writ."

He then wrote an anonymous letter to Franklin Evans, Cambridge, Mass., requesting him to tell his mother that her child was very sick, and wished her to come home immediately. This was entirely false. This letter was written just a week before the death of Mrs. S. The next Wednesday he wrote to Abba and pressed his claims to her hand. They had an interview, when she told him what she had repeatedly told him before, that her mother would never consent! She finally dismissed him. The prisoner replied that she would be sorry for it, and that, too, before long! The next day Mrs. S. was made acquainted with the facts, and expressed herself highly gratified at the long looked for result.

On the Sunday of the murder, prisoner went to Mrs. E.'s, invited Abba to ride down home. She hesitated. He then informed her that her cousin from Denmark, together with a young gentleman, were at her mother's. Still she refused, saying it was Sunday, and she concluded not to go. This was another falsehood of the prisoner.

But to return to the early part of Monday morning, when Mrs. Richardson found the body as I have described it. When Mrs. R. had satisfied herself of the death of Mrs. S., she left the bedroom and came back into the sitting room, from which the door to the bedroom opens. On the window sill in the sitting room was a testament, on which was a piece of paper with some writing on it. She picked it up and tried to read it, calling the attention of others in the room. They finally succeeded in deciphering its contents. The prisoner was present, but showed no disposition to see it. The writing purported to be written by Mrs. S. The writing is course, the spelling is bad. It was supposed at the time to be Mrs. S.'s act from the sentiment it contained. It has proved to be the prisoner's writing and spelling; for I asked him at the coroner's inquest to write the same sentence, pronouncing to him the words, his not having seen the paper since it was found, and he wrote it, spelling exactly like the original and writing as nearly as it can be done.

If, without this last item of evidence, you might perhaps have some doubt as to the author of the crime, I believe when

you come to see it, you will conclude beyond all reasonable doubt that what he intended as a "fig-leaf" to cover the nakedness of his guilt, has proved overwhelmingly its exposure.

Such, gentlemen, is a brief outline of the evidence which the Government will offer, to prove that Mrs. Harriet B. Swan is dead; that she came to her death in Fryeburg, in this County, on the 17th of June last, by violence; and that Ephraim Gilman, the prisoner, wilfully, maliciously, and of his malice aforethought, perpetrated the violence in the manner and by the means set out in the indictment.

Mr. Virgin stated that in consequence of the storm, the witness whom he had intended to call first had not arrived, and he proposed to put in prisoner's testimony before the coroner's jury at the inquest on the body of the deceased.

Mr. Wedgewood. We are willing it should go in for what it is worth, but as Gilman had no counsel there, we cannot admit it as a basis for future testimony.

Mr. Drummond. The Government cannot consent to any limitation upon its use.

The COURT suggests that it be withdrawn for the present, and allow the counsel for defense time to examine it, and then if it is objected to, the question may be determined.

THE WITNESSES FOR THE STATE.

Dr. Thomas H. Brown. Made a post mortem examination of Mrs. H. B. Swan, on 18 June, 1861, at Fryeburg. There were present Drs. Towle, elder and junior, Dr. Lamson, of Fryeburg, and Dr. Towne, of Lovell. I found the body upon a bed, at her residence in Fryeburg. Her head was near the edge of the bed, and she lay upon her right side. Her lower extremities were slightly bent, the left leg being somewhat in front of the right. The trunk was nearly straight and a little turned upon the abdomen. The head was

turned somewhat upon the face, the lips nearly touching the clothing upon which she lay. Her back was towards the front side of the bed; and the head lay nearly over the front side of the bedstead, about a foot from the head board. Her feet lay a foot and a half from the front of the bed, near the foot of the same. The right arm was nearly straight, and was stretched in a line forward in front of the shoulder. The left arm was bent, the hand lying near the elbow of the right arm. Directly under the mouth there was an irregular

bloody stain, some two inches long and an inch and a half wide, oval in shape, upon the pillow. Another stain was seen upon the pillow case under and behind the head.

Around the neck was found a reddish silk scarf or neck tie, a yard or more in length. It was passed around the neck from the front, the two ends being carried back, the right end being carried around back of the neck, then forward to the left side in front, and then still further forward till it was loosely grasped in the left hand. The left end of the scarf was carried in a similar manner, around the opposite side of the neck, and ended in the left hand by the side of the other. This scarf was not tied in any knot about the neck. It was double on the back and sides of the neck; but single in front of the neck, the two ends approaching each other from the two sides of the neck and meeting in the hand. The scarf was folded upon itself, but smooth; and was drawn close to the skin, but made no mark or indentation or discoloration in its course.

The bed clothing consisted of a sheet and light quilt, and was found covering the whole of the lower extremities and the trunk as high as the shoulders. They lay smoothly over the dead body. On removing it a large, dark, bloody spot was found upon the under sheets directly beneath the lower part of the pelvis.

On removing the body linen, no purple, dark spots or bruises were found upon the trunk or lower extremities. There were some ecchymosis on the more dependent portions of these parts, especially about the chest.

The face was much bloated and

suffused with blood, and was of a dark purple hue. Much ecchymosis and discoloration on the dependent portion. The eyes were very prominent, partially open and thoroughly engorged with blood.

On removing the scarf, the front and lateral parts of the neck were found bruised and discolored in spots. Nearly in front of the upper margin of the larynx there was a bruised spot nearly two inches long, extending across the front of the neck. The cuticle was abraded and the tissue beneath was of a dark brown color. This bruise was about two inches long, extending backward about equidistant from the mesian line. It was irregular in shape, and its ends were circular. Its width was half or a quarter of an inch. The bruised spots were smooth, and the true skin beneath was hard and dry. On the left side of the neck, at the upper margin of the larynx, two other bruised spots were found. They were about three inches from the mesian line. They were oval in shape, about three-fourths of an inch long. Both about same in size, each being about half an inch wide, meeting each other towards the front of the neck. The longest diameter of these spots was transversely of the neck.

There were three distinct bruises on the right side of the neck, about the same distance from the mesian line of the neck as those on the left, and nearly opposite. One was an inch long and oval in shape, being over one-fourth of an inch wide. The two other spots were near the first, about the size of a three-cent piece, irregularly oval in shape. One was in front and the

other behind the first named. The one behind was a little higher up. The cuticle was abraded over all these spots, the parts beneath somewhat dried and of a reddish brown color. On the right side of the neck near the spots just described, were three crescent shaped marks, two of them running together at their extremities, the other being near and solitary. The convex side of these marks looked obliquely upward. The marks were slight and of a red color. One was a little over half an inch long, the two others a little less. A crescent-shaped line made with a pen, charged with red ink, would represent these marks.

There was one other bruised spot on the left side of the neck, about two inches behind those already described on same side, nearly same height upon the neck. It was oval in shape and about as large as a three-cent piece, and of a reddish brown color.

The lungs throughout their whole extent, right and left, were found engorged with dark fluid blood. The pleura costalis was of a dark red color. The pleura pulmonalis was generally a dark purple. Some points were lighter, approaching red. An incision into any part of the lungs was followed by an effusion of dark fluid blood. The substance of the lungs was, at all points, very dark and engorged with blood. There was a small quantity of light colored serum, nearly a gill, I should think, in the right cavity of the pleura. In other respects the lungs were healthy. They had no appearance of chronic or acute disease, such as ulceration, tubercles, abscess, induration, or hepatization.

The external veins of the heart proper were engorged with dark fluid blood. The right auricle and ventricle were full of dark fluid blood. The left side of the heart was nearly empty. The organ, as a whole, was nearly or about the usual size, and except the engorgement, was natural.

The stomach was unusual in length, being some ten inches long, and moderately distended with flatus or gas. The peritoneal coat was of a darker color than natural. The mucous membrane was also somewhat injected with blood. The veins were distended and of a dark color. In other respects it was healthy. The contents, amounting to a pint of undigested food, and gastric juice, were preserved and tested with a view to ascertain whether any strychnine was present; but none was found.

The liver was, externally, darker than natural, being engorged with dark blood. Several incisions made into its substance were followed by an oozing of dark fluid blood. Its texture was firm, and had no appearance of disease.

The large and small intestines were moderately distended with gas. The peritoneum was redder than natural, and the veins were engorged and of a dark color.

The omentum or caul was of a dark, dirty hue. It was thin and membranous, having but little adipose matter.

The spleen and pancreas were engorged with blood, and darker than natural. In other respects natural. The mesenteric veins were highly engorged with blood of a dark color.

The uterus was a little larger than natural, and, as its cervix, there appeared to be a small

amount of chronic induration. It was confined to the lower part of the os uteri. There was no ulceration without or within the organ at this point; nor was there any appearance of disease, contusion or violence at any point about the uterus or vagina. There was some engorgement of the larger veins about the external parts of the body and fundus. The mucous membrane of the uterine cavity was likewise engorged with blood, and lined with a thin covering of a dark fluid, resembling the dark blood in other parts. It was small in quantity, supposed to be cantamenial.

The aura mater and brain were highly injected with dark blood. The scalp was also full of dark fluid blood. The sinuses and veins, on being cut, discharged a considerable quantity of dark fluid blood. In other respects the brain was healthy.

On 19th of June, I examined the internal parts of the neck, the same physicians being present. An incision was made into the parts beneath the bruised spots. The muscular and cellular tissues were darker under the bruised spots than at other points. At the upper margin of the larynx where the cartilages meet and pass backward, there was considerable enlargement of the mucous membrane lining the inside. The fauces and tongue, the latter of which was protruded forward, were highly engorged and of a dark color. There was no extravasation of blood found in dissecting the neck.

I concluded that the cause of death was strangulation. I mean an interruption of the air passing to the lungs. Strangulation or interruption of air to the

lungs may take place in several ways. It may be effected with the hand, or by a cord around the neck, or it may be accidental. If the interruption of air is produced in any way, and continued for a short time, death must ensue. The air must come in contact with the blood, in the lungs, so as to fit it for the purposes of vitality and nutrition. The conditions of discoloration of the blood—its fluidity—the engorgement of the various organs, especially the lungs, pleuræ, brain, mesenteric veins and the substance of the heart, the presence of a large amount of fluid blood in the right cavities of the heart, and its absence in the left cavities of that organ, together with the dark spots about the front and lateral parts of the neck, near the upper margin of the larynx, all indicate strangulation.

Blood, retained in the lungs, and not coming in contact with the air, does not undergo the natural process of arterialization. It becomes dark, or remains dark, like venous blood, and retains in its composition carbonic acid and other deleterious agents. When such blood, impure and non-arterialized, passes into the circulation of the various organs, their healthy operations are impaired, and if such impure blood continue to circulate, even in small quantity, for a short time, the functions of the brain, muscles, nerves, stomach, and all other organs are not only impaired, but soon cease altogether.

The blood is carried to the lungs from the right side of the heart. When it arrives at the right side, through the systemic veins, it is venous blood, and is always dark in color. It is sent

to the lungs in this condition. If respiration proceeds uninterrupted, it passes to the lungs through the pulmonary arteries, where it receives oxygen from the atmosphere, and parts with carbonic acid, when it becomes changed from a dark or black to a red color. This change is called the oxygenation or arterIALIZATION of the blood. If, however, the air is not allowed to enter the lungs, the blood does not undergo this vital change; but passes through their substance, essentially venous or impure in its appearance and quality; and passing onward through the pulmonary veins, arrives at the left side of the heart, whence it is sent into the general system. The interruption of respiration, as by strangulation or smothering, impedes and eventually arrests the circulation of blood through the lungs. The dark blood from the right side of the heart accumulates in the lungs, and if continued, engorges them with venous blood. The right side continuing to receive the venous blood from the system, continues to contract and force it into the lungs, till at last the lungs are so engorged they can receive no more, when the heart itself—the right side—becomes engorged and filled with venous blood. But not so the left side. The venous blood becoming stationary in the lungs from continued want of respiration, it cannot become oxygenized and arrive at the left ventricle of the heart. The left ventricle not receiving its usual supply of blood, but continuing to contract, soon becomes empty, and is found empty after death. Such was the condition in this case; the right side of the heart was filled with

dark fluid blood, the left was empty, or nearly so.

Cannot say how long it would take to kill a person by compressing the larynx. It would depend upon the amount of compression, and the more or less perfect interruption of air to the lungs. If the interruption was imperfect it might take twelve minutes, or more. If perfect, it might take but two or three minutes. It took some little time in this case. If it had been done suddenly the blood might have been found clotted, as in apoplexy—the engorgement would not have been so general and so great; and the blood not so dark and fluid.

There was no circular mark under the scarf upon the neck. There was no constriction, or appearance of any produced by the scarf. I saw none—none produced by any scarf or cord about the neck—none that could affect the circulation or breathing.

The stain upon the pillow was bloody mucus. In cases of strangulation, bloody mucus may issue from the mouth. There was some frothy and bloody mucus in the larynx.

The scarf could not have caused the spots around the larynx, and the abrasions of the skin upon the sides of the neck.

There is no case on record of a person strangulating himself with his own hand alone, and in my judgment it cannot be done. I am unable to say what might be done, but can say positively about this case, there being no appearance of circular compression about the whole neck, the strangulation could not have been done by the scarf. I think it could not have been done by the

deceased, but must have been done by another.

If a person should be strangled by another with the hand, I should expect to find spots of a circular shape about the larynx and sides of the neck. The number of spots might vary. Might find on one side a single bruised spot, answering to the thumb, and on the other all the fingers, or part of them; or we might find more than one mark made by the thumb.

I think compression could take place over the larynx, near the mesian line. Much of it, in this case, took place just above the margin, and upon the margin of the thyroid cartilages. The crescent-shaped spots were found upon the right side, and situated near the bruises. I should not have expected to find the crescent-shaped marks if the bruises were made by the hand outside of the scarf.

Cross-examined. I think it was June 18th, in the afternoon, that I made the examination. Cannot tell what time we commenced. I think it must have been as late as three o'clock. The examination of the internal parts of the neck was made the next morning. I think Dr. Lamson was present, and the two Drs. Towle. I think the examination was supposed to have been closed Tuesday night. It was afterwards found necessary, in my judgment, to dissect the neck and we did so, by notice and agreement of the physicians.

A line drawn around the neck would hit most of the bruised spots. All the spots nearly of the same height. Spot over the larynx nearly two inches long and half an inch wide. The two spots on the left side somewhat

situated one above the other. One a little further back. Those on the right side about the same height on the neck as those upon the left. The lone spot was a little posterior to the ear, a little behind the posterior margin of the sterno-cleido-mastoid muscle. There was a space perfectly natural and healthy, between the lone spot and the others on that side, a space of an inch and a half. This spot was nearer circular than the other spots on side of neck, but similar.

There was no indentation in front. If the scarf had been put about the neck and drawn tight enough to produce strangulation, in my opinion it would have left an indentation or mark of injury in its track. If the scarf had been left upon the neck, and been loosened as soon as the deed was done, it might not have left marked indentation; but I should have expected in that case that some mark about the neck would have been found. To have produced strangulation, the scarf must have been drawn around the neck tight enough to compress the air passage and other tissues.

Think, if the scarf had produced strangulation, there would have been more or less discoloration where it was tightened upon the neck. It would not necessarily have produced laceration of the true skin. If the scarf had been put about the neck and sawed across it somewhat, it might produce an abraded appearance of the cuticle; but not such circular spots and detached bruises as were seen in this case. If the scarf were applied with sufficient violence, being twisted upon itself, to produce abrasion it could not have produced the

appearances here seen. I should say the marks found upon this neck could not possibly have been made by a twisted scarf sawed about the neck. It might produce abrasions, but not such as these. The spot over the larynx could not probably have been made in this way. The mark under the ear could not have been produced by drawing the scarf, twisted or not, around the neck. There might be a slight or considerable difference in the effect upon the true skin whether the cuticle were cut off or contused off, or torn off, by sawing a scarf upon it. A contusion or bruise might be so severe as to destroy or disorganize the true skin. But a simple abrasion, or a blistering, might not injure the true skin. This difference could be ascertained by dissection.

The spots most engorged about the neck were at the upper margin of the larynx, beneath the lateral bruised spots in the neck. The upper margin of the larynx and the space between the hyoid bone seemed to have been compressed. It seemed to me that that injury to the mucous membrane, lining the inside, was produced by violence outside. It may have been produced by violent inspiration or expiration of air in its passage to or from the lungs. If the air was not fully interrupted, the death would be gradual and prolonged. In this case, as before stated and for the reasons given, the death may have been somewhat protracted.

The cartilages of the larynx were not dislocated or broken down, but were found in their natural position. The thyroid cartilages appeared to be compressed at their upper margins together. These cartilages are

elastic, and admit of compression as they were not ossified. They can be compressed enough to injure the mucous membrane above and under their margins, in respiration, without breaking them down. I should not say they could be compressed together for some time and then return fully to their natural position, as I never saw it done. If the thyroid and other cartilages of the larynx had become osseous, they would break or be fractured by severe compression. It is not a common thing for these cartilages to become ossified in a person only thirty-eight years of age. They were not ossified in this case. In persons beyond this age there is a tendency to ossify. I have no personal knowledge of the extent of this tendency. The tendency, in most cases and generally, after these parts have assumed their full development, is for cartilage to remain cartilage, and bone to remain bone. The cartilages themselves are elastic and resist compression, while membranes, muscles and cellular tissue do not. Did not make a very critical examination of the neck, except under the bruised parts. There was no solution of the continuity of the parts of the neck. The membrane lining the parts just above the larynx, and beneath its upper margin, was different from simple congestion or engorgement. It was thickened or hypertrophied.

Left ventricle of heart was nearly empty. It contained a little dark blood, perhaps a great spoonful. Nothing about the heart to indicate apoplexy. The condition of abdominal organs was such as to indicate that the struggle of death was somewhat protracted. There may be a pos-

sibility that apoplexy had something to do with the manner in which death was produced. I think it must have been produced by strangulation. If there was partial strangulation, the symptoms might resemble those described in the post mortem examination. But there being no extravasation of blood in any part of the brain or its ventricles, and so great an amount of engorgement in all other organs, it is reasonable to suppose it could not have been apoplexy. I can have but one opinion as to the cause of death in this case. It must have been strangulation. I cannot even entertain the opinion that it was part strangulation and part apoplexy. Congestion of the brain and loss of the cerebral functions might have occurred early in the attempt at strangulation.

THE COURT. Do the Counsel for defense contend that if there was a strangulation, and then congestion of the brain took place, it changes the case?

Mr. Wedgewood. No, your Honor, if we admit the homicide. The tendency of these questions etc., is to show that it is a case of attempted suicide, with apoplexy supervening.

Jane D. Richardson. At the time I lived within less than a quarter of a mile of Mrs. Swan's house; last saw her the Saturday before she was found dead on Monday, June 17th, 1861. She was at my house; prisoner came about half past five, on Monday morning, and said he wanted me to go down to their house as soon as I could; asked him why. He said Mrs. Swan was dead; asked him a number of questions, such as what was the matter, etc., with-

out waiting for a reply. His answer was, that she had choked herself to death; started at once for their house. Heard him say to my husband, we want you too; didn't wait, but they passed me and went into the house first; found them standing in the kitchen when I entered; asked prisoner where she was. He either said in her bed, or in her bed room; don't recollect which; then went into bed room, they following close along. I found her lying on the bed with this scarf (produced) about her neck, both ends in one hand, dead; her hands were cold; loosened scarf about her neck first. The ends of scarf were in left hand; drew one end from the hand in which it was clenched, and took my thumb and finger and loosened scarf from neck. The scarf was put around her neck straight in front, carried round behind, crossed, and both ends brought forward. Her right arm lay extended across head of bed. She was lying on her right side, and on front side of bed. The limbs lay in a natural position, not straight, but not much bent; her face was pretty much turned into the pillow, her left shoulder a little forward. Rubbed her arms, they were cold. The two children were then in bed with her. The girl about nine years old, on back side of bed, trying to dress and crying bitterly. The boy, about two years old, was in the bed. Did not then notice any spots on pillow. The bed clothes were smoothly covered over her. They came up pretty high—over her elbow. Did not see any disarrangement about them except on back side of bed, where little girl was getting up. The little boy was lying next to her—his

head below her right arm, and above left arm.

Was excited and cannot tell how much effort I used to draw that scarf from her hand, but it don't seem to me that I used much of any effort, very little; had no difficulty in removing it. Did not disarrange bed clothes; drew out the little boy and let the clothes drop back. My husband stood by the side of the bed and prisoner at the foot. He asked me what should be done, and said his horse was harnessed. I said he had better get Mr. McIntyre, and my husband Mr. Walker. Soon Mr. Oscar McIntyre came in. He asked me if it was true Mrs. Swan was dead. I told him to go and see. Saw him examining her face, pressing down the pillow; asked him if it was true that she was dead. He said she was dead and had been so some hours. He said, let all things remain as they were. As I passed out of the bedroom, saw a writing lying on a book—the Bible, I thought. I said, I have found something which I think will throw some light upon the subject. Mr. McIntyre asked me to read it. Prisoner says, "What is it?" I took it in my hand to read it, but finding I could not, I asked Mr. McIntyre to read it. He said he had not his glasses, but said what he thought the first words were, which troubled me, and then I said I thought I could read it, and did so. Prisoner did not ask to see it; did not look over or near us, to see what it was. He said no more about it. This is the paper, I think. [Paper marked No. 1.] There were a pen and inkstand in the window. It had a wooden handle. I took it up, but did not examine

it. This scarf is the one. [Witness shows how it was held in hand of deceased; the ends between thumb and forefinger, the thumb bent at a right angle, and inside of fingers.] The Saturday before, when she came to see me, she seemed in very good spirits, and said she had come to tell me how happy she was. She said her health was not very good, but was better than it had been for the week previous.

Abba F. Swan. Mrs. Harriet B. Swan was my mother. June 17 last, was residing at Mrs. Sarah N. Evans's; went there some three weeks before mother's death; had lived at home previously. Gilman had been living at our house two years. Our family was composed of mother, Gilman, myself, and three other children, one nine years old, one six, and one two. Went to Mrs. Evans's to keep house for her, while she went on a visit. She had a son, Franklin Evans. There were five at her house besides myself—her sons; her husband not living. She was gone some four or five weeks; saw my mother at meeting, and at Phineas Evans's on Sunday before she was found dead on Monday. The Thursday before that, I saw her at home, and had conversation with her about the relations between myself and the prisoner. Saw him the night before this Thursday, at Mrs. Evans's. He came in and handed me a letter. It was written by him and addressed to me. That letter was burned that Thursday after I had seen my mother; did not show the letter to my mother, and did not say anything to her about it; saw Gilman that same Thursday and had conversation with him at mother's, in sitting room; no one

else present. He had been "paying attentions to me," previously to this time, and that was the subject of this conversation; had informed him I did not wish to "keep company with him" any longer; that mother objected to it. He said I should be sorry; asked him "why?" He made no answer. He did not say anything about my marrying anybody else, or about the Evans boys. When I went to Mrs. Evans's, he was opposed to it; asked him if he would carry me there. He said he could, but he would rather carry me into the graveyard than over there. He didn't say why. At this conversation, he didn't make any threats; but he did at another time—I don't remember when or where. He said he would kill Andrew Evans. Andrew is over twenty-one.

When I came out of the sitting room, I communicated to my mother the result with Gilman. Had known that she was opposed to my keeping company with him. Saw Gilman next Saturday afternoon. He came to Mrs. Evans's on horseback, and called on me; also saw him Sunday night; came to Mrs. Evans's with horse and wagon, and asked me to ride with him over home. He said they had company and wanted me—a lady and gentleman; that the lady was Hattie Swan, my cousin. He wouldn't say who the gentleman was, and laughed. I declined going. He still asked me to go; told him I didn't wish to go home Sunday night. He stopped ten or fifteen minutes, then went towards home, about a mile off.

Next saw him Monday morning at Mr. McIntyre's, where I had gone when I heard of

mother's death. He came there for me, but I told him I should not go with him, because he had killed mother. He said, "Oh, Abby, how can you think such a thing against me?" I told him it was hard to judge him, but I did. I asked him to get out of wagon and come so I could ask him some questions. I asked him to tell me the last words mother said to him. He said, "as she stood at her bed room, she asked him to go to Harriman's in the morning and get a pig."

Sunday, the week before, I went down to his sister's with him. He told me he had written a letter to William Holt (who was in Massachusetts), and William wanted me to write one and put in with his. After I got home I did so. I directed the letter and he took it. I have forgotten whether I saw his letter or not. He wrote it at home. Have seen him write, but not a great deal; have seen some, but very little of his writing. I am not particularly acquainted with mother's writing. Have seen her write her name. She was right handed.

March 20.

Did not burn the letter of Gilman to me, which I mentioned in my testimony yesterday. Mother or aunt Irena March, my mother's sister, burned it at mother's, on that Thursday. Handed it to aunt and she showed it to mother after I was gone. Gilman, at the Coroner's inquest, asked me where that letter was, and I told him it was burned.

Monday morning, after death of mother, and after I got home, he asked to speak with me and did, but did not say much. This was in kitchen. Others were

there, or near there. Tuesday forenoon, he asked to see me in parlor; no one else was present. He asked me to sit down, as he wanted to see me. I told him no, all I had to say to him I could say standing up. He asked me what I had been saying about him. I told him, "nothing but the truth." He asked me why I told them, he said he would kill Andrew Evans. Told him I was asked to tell all about that, all the truth, and nothing but the truth. He said he only said it in fun, and didn't want me to mention it. Don't think there was anything said at this con-

versation about our relations. I had previously told him my mother objected to my marrying him.

The Sunday of the week before, when I was at home, at the time the William Holt letter was written, Gilman said he had written another letter; asked him to whom, and he didn't wish to, and didn't tell. I have seen these papers before, [an envelope and letter, marked No. 2, No. 3.]

First saw them Saturday night before mother's death, at Mrs. Evans's. Nelson Evans brought them from the Post Office.

Mr. Virgin being about to identify them as being in the prisoner's handwriting, it was admitted by the counsel for the defense that the letter and envelope are Gilman's, were written by him at the time of their date, sent by mail to East Cambridge, Mass., according to the direction, and were then sent back enclosed in a letter to Nelson Evans, which he took from the Post Office, and that the statements in the letter (No. 3) were not true.

The envelope (No. 2) was then put in evidence. The direction was, "Mr. Frankling F. Evans, East Cambridge, Mass."

Also the letter (No. 3) which read as follows:

"Fryeburg, June 9, 161.

Dear friend. I take my pen in han, to in form you of your brother, which is very sick, and wants your mother to come home as soon as possible, and so Good by."

Mr. Virgin. I offer a letter directed to William Holt, as the one written by the prisoner.

Mr. Wedgewood. We don't admit this letter was written by the prisoner.

Miss Swan. From my knowledge of Gilman's handwriting, that this is his.

The letter (marked No. 4) dated June 8, 1861, is put in.

[This letter was introduced as a specimen of Gilman's ordinary handwriting. It was afterwards admitted by his counsel, that the letter was his, and in his handwriting.]

Miss Swan. The paper recognized by Mrs. Richardson, I think is prisoner's handwriting.

Have seen this pen before. It belonged to our house some-

where, but I don't know whose it was particularly.

I think it was on that Thursday, he said he would kill Andrew Evans. On that day, in

speaking of my dismissal, he said I should be sorry in a short time. Think that is the time he spoke of killing Andrew Evans. I told him he need not blame Andrew Evans, and that he needn't kill Andrew Evans; if he killed anyone to kill me. He said he didn't mean that.

Cross-examined. Cannot tell how long the relations spoken of between me and Gilman had existed. He had been living at our house, and I suppose had been paying attention to me. They had no definite commencement. He lived there before father died, and continued there up to mother's death. He first solicited my company 2 or 3 months after father died, in November, 1859. Had then no communication with mother about it. First talked with mother about it in the winter or spring after father died. She did not wish me "to go with him," "to keep his company." [The counsel asking witness to explain, His HONOR observed that these are "technical terms" among young ladies.]

Rode with him quite frequently; don't know that she objected to it. I have not gone with him to his friends and passed the night, have been at my friends. Have called at Mrs. Huston's, his sister's, with him, but not to stop long. First told him mother was opposed to it, some time previous to that Thursday. He never said a word to me against her; always spoke well of her to me; he lived in our family as one of them. He did chores at the barn, and milking most of the time. He would have times when he was not so pleasant as at others; never heard him cross her, or say anything disrespectful to

her. Have no writing of my mother's; have not seen any of it in late years. I saw this paper (No. 1,) the morning her death was discovered. Was very much excited, and hardly noticed it. Did not take it in my hands. Can't tell who had it. Have no recollection of expressing any opinion about it.

He did threaten more than once, but I can fix only one date. He had said he would kill Andrew Evans, before that Thursday. I don't know whether I mentioned these threats or not, before mother's death; may have told somebody.

Suppose I had encouraged him, but at the same time told him my mother was opposed to it. Cannot tell when I first communicated to him, that she was opposed to it. It was nearer twelve months than one before she died. She was generally willing I should ride with him, but may have objected some times. I don't recollect any particular time. She would rather I would stay at home, because she was opposed to my "keeping his company."

T. C. Ward. Was one of the coroner's jury at the inquest on the body of Mrs. Swan. The jury was composed of Dr. Ira Towle, Dr. Lamson, D. R. Hastings, A. R. Bradley, Geo. B. Barrows, and myself. The prisoner was a witness, and testified before us. His testimony was taken in writing by Hastings. He signed what Hastings wrote. It was read to him before he signed it. He was sworn before he testified. Oath was administered by Hastings. The arrest was not made till after his examination.

William W. Virgin. Attended the coroner's inquest part of the time. My impression is, Hastings was one of the jury. He took all the testimony while I was there. He read it to Gilman before he (Gilman) signed it. Took the paper into my possession and have had it ever since. Sent a copy to Mr. Ayer, pris-

oner's counsel. Saw Gilman sign it. That paper is the one. Should not say he declined or objected to testify, any further than hesitation might be so called. Hastings stated to him what the law was, that he was not bound to criminate himself. Cannot swear distinctly to his telling him so more than once.

The paper containing Gilman's testimony before the coroner's jury was then offered in evidence and objected to.

Mr. Drummond argued for its admission, and *Mr. Wedgewood* replied.

The COURT. In England, the question is not settled as to the admissibility of this kind of evidence. I understand that in Massachusetts it is settled that it is admissible. I think it was admitted in the Coolidge case in this State. I, therefore, admit it, but will note the exception and save the point if desired.

Mr. Wedgewood. Yes, your Honor, we desire it.

The paper was then put in and read to the jury, as follows:

Ephraim Gilman. Aged 24 years, lived in this family two years last April. Yesterday about 8 o'clock, I went away with Albion Richardson, and went to Pike neighborhood; got home about 3 P. M. When I came back, deceased was getting supper. Eat supper with family, and Mrs. Swan eat with them; eat as usual; had cold pudding, flour bread and pie for supper. Stayed till about 4 o'clock, and then horse got loose, and went after her; got her and went up to Phineas Swan's; Richardson went up to tannery with me. Came home and went to Andrew Evans'; and came home and harnessed my horse, and went and got cows and milked. Then Samuel McIntyre and I went up to the field and saw the corn, and came home and locked the door and went to bed; went up to see how the crops looked, and asked him to go with me. When I came in she was in the sitting room. I went out in the kitchen and got my shirt; when I went out to go to bed she asked if I wouldn't go up to Calvin Harriman's and get a pig this morning.

When the horse got away she was talking with me and asking how the crops looked; saw nothing unusual in her appearance. Did not seem to be low spirited that I saw. She then asked me when I was going to hoe, and I told her I was going to commence this morning. After I came back from Evans', she asked me where I had been, and I said I had been to ride.

When she asked me to get the pig, she was just going into her room to bed. She went into her room. We both left the sitting room about the same time, she going towards her bedroom and I to bed. I went into my bedroom directly after I had this conversation; then went into kitchen and got my shirt, then went to bed. Her little boy slept with me, and I slept on the foreshide. After I got with my shirt into my bedroom, I heard her in her bedroom. My

bedroom door was open; I did not shut her bedroom door; she sleeps usually with her bedroom door open. I lay fifteen or thirty minutes after I went to bed before I went to sleep. I should have heard her if she had gone from the bedroom into her kitchen, I think. I now have on the same coat, but not the pants, that I had on last night. I heard no unusual noise after I went to bed, in her bedroom. I did not write any letters yesterday, and did not have my pen and ink out. I kept ink in the parlor generally, and last time I used it I left it there; that was a week ago yesterday; these letters were to go to mail; one to William Holt, and other to my sister. Sent them to the corner a week ago yesterday by John Walker; my sister lives in Saco, and Holt at West Newton; one letter I wrote before breakfast, and other after; I have written no letters since that time. Have not used the pen since, that I know of. I got the paper of a Richardson who had a package, and I paid him for it yesterday. I bought it last spring, and paid him the balance, eight cents, yesterday. I think I have some of the paper left. I gave some of the paper to my sister who lives in Fryeburg. I never gave any of that paper to Mrs. Swan; the paper was small and large sheets. I did not wake up or get up during last night; should think I got up about 4 o'clock, which was about usual hour. When I got up, I went into kitchen and put on my shoes there, and went out and got my horse and went to Calvin Harriman's and got a pig; went out of the shed-room door; unlocked it when I went out. Started for Calvin Harriman's twenty minutes to five, or about that. When I got there, Calvin's wife asked me how the folks were, and I said to her that they were pretty smart, but Mrs. Swan said she felt kind of fushy. While Mrs. Swan and I had the talk, while the horse was hitched near the door, she asked me if I was going to Sunday School this summer. I told her I thought I should, but did not feel like going that night, and she said it made her feel kind of fushy going to meeting all day; she was in the sitting room while this took place. I went up to Evans' that day to see Abby Swan, for I had seen John Swan, and he said his sister Hattie would be here, and I thought Abby would like to see her. I went to Evans' and Abby came to the door, and I asked her if she wouldn't come home, and she said it was Sunday night, and she guessed she would not come. I told her that Hattie would be here, for I suspected she would be here.

When I got home it was twenty-five minutes past seven, and then I put the horse up, and I asked who would milk; she said she did not want me to ask her to milk, as she did not feel well, or something of the kind. She has been pretty slim for a fortnight past. She got cold and it settled in her back. When I left Calvin Harriman's this morning, I came directly home; took pig out, put him in the pen, and turned the horse out. Distance from here to Calvin Harriman's, about two miles; carried the bridle into the barn; shut the door, came into the house, got the milk pails and milked two cows; brought the milk in, set it in the sink; went out to the door and came back again; went into the sitting room and spoke to her; she did not answer; then I opened the door. I spoke two or three

times before I opened the door; said Mrs. Swan; and then I opened the door and spoke pretty loud, two or three times calling her, and then I called for Mary Eliza; neither awoke; then I went up to the bed, near to it, and saw she looked pale, and that she had something about her neck, and looked as though she was dead; then I reached over and awoke up Mary Eliza, and told her that her mother was dead, and she cried, and I told her I would go up and get Mrs. Richardson. I saw that she looked pale, and that bloody stuff came out of her mouth. I called to her, and said Mrs. Swan, after I called Mary Eliza, and before. I had to shake Mary Eliza to wake her up. I woke her, but did not wake the little boy.

The bed clothes were up around her shoulders, and the scarf, both ends I think, (though I took no particular notice), was in one hand; which hand I can't tell. I don't remember whether she had a night cap on or not. I always got up and milked before she gets up. I generally get up, milk, and cut bushes till called for breakfast. Told Mrs. Richardson I wanted her to come down for I thought Mrs. Swan was dead; think I said that I thought that she had killed herself. I thought she had killed herself because she had a scarf around her neck. When I came back, Mr. and Mrs. Richardson came with me, and we went into the room about together, I think. I thought she had killed herself, for I remembered Nat. Hutchins' wife had choked herself, and thought Mrs. Swan had done so.

The scarf around her neck was mine. I did not recognize it when I looked at it, and it did not then occur to me that it was mine. It was dark in there; the curtains were drawn, and I was frightened and did not look at it much. The last I saw of the scarf it hung up in my bed room. Can't tell how long ago; had not used it for some time; never wore it but little. I planted some corn and beans first of June; took corn in one pocket and beans in the other, and replanted where worms and crows had destroyed.

Was at the village last week, Monday and Saturday; bought some strychnine last week Saturday, of Phil. Eastman; told him the crows had pulled up the corn, and he asked why I did not poison them. I said I did not know what would poison them. He said strychnine would do so; bought twelve cents worth done up in paper; said I must soak it with corn in water; must put it all out as it was dangerous stuff to keep round. I dissolved it, put it in a birch bucket with water and corn Saturday night, and let it stand till Sunday morning. I knew it was done up in one paper at Eastman's. I laid the corn out Sunday morning. I burnt up the birch bucket. Set a trap in the field and strewed the corn around it. Have not been to it since. I laid the corn out and burnt the bucket before breakfast Sunday morning last. I wrote the anonymous letter to Franklin F. Evans, now shown me. I wrote the letter to Mrs. Evans, so that she would come home. I wanted her to come home so that Abby might come home from Mr. Evans'.

Since testifying above, I have visited said trap.

Signed,

EPHRAIM GILMAN.

Dr. Daniel G. Towne. Was the coroner that held the inquest on the body of Mrs. Swan. Certain papers were produced there which I marked; also marked paper No. 6. I saw Mr. Gilman write this paper (No. 6) before the inquest. I recognize by my mark, and identify Nos. 1, 2, 3, 5 and 6; they were all there. I took possession of No. 1, and this is the same paper.

This scarf [one shown witness] looks like the scarf we found about the deceased; have no doubt it is the one.

Was not present all the time during the *post mortem* examination. Got there June 17, about 11 o'clock. We organized the inquest before we went in. The body then lay on right side on the front side of bed, with right arm extended, nearly up to the head of the bed, a little elevated from a horizontal position; the right hand was open, or nearly open; the left hand was in this position, [illustrated, hand on breast, the arm bent at about a right angle at elbow,] and held one end of that scarf—the end in which the knot is and was then; the left hand was not shut very close; the legs were drawn up a little, lying about naturally, as anyone would lie. The head was turned back with face a little inclined to pillow; eyes open, bloodshot and protruding. I noticed two spots, one under the mouth and one behind the head on the flap of the pillow case where it is longer than the pillow. The body was then facing towards back side of bed, but lying on front side of it. I examined the spots. They looked like bloody mucus—the secretion of the mouth saturated with blood. The spot on flap of pil-

low was as large as a half a dollar or larger, and nearly circular in shape. This spot was not discovered when we first went to the bed. In pulling a fold out of the pillow case it came in view. The pillow case, at the end, had been folded or tucked up in some manner, hiding the spot. It was about a foot behind the head. The spot under the mouth was not circular, but larger than the other, and was visible without turning the head.

Helped move the body from the bed. There was another stain on the sheet under the body, about half way down the bod. I examined it particularly; judged it was something like menstruation.

One end of the scarf was not in her hand. It was loosened about her neck—only one strand in front of neck, and crossed behind.

I saw the marks upon the throat. Heard Dr. Brown's description of them yesterday, and agree in his description of them. One mark on right side of neck, one on left side some inch or more from spine, as large as a ten-cent piece, or a little larger, and three other spots. I requested Dr. Towle, Jr., or Dr. Lamson to put his hand on her throat with her face towards him. Tried it two or three times and came to the conclusion the hands, fingers and nails would cover the marks.

The scarf was not twisted. In my judgment, as a medical expert, the marks I saw could not have been made by this scarf around the neck.

When I first saw her, the teeth were a little apart, tongue swol-

len and protruded just over the teeth, a line or two.

Cross-examined. The inquest was closed Tuesday afternoon. The throat was dissected the next morning.

Under some circumstances some of the external signs might have suggested poison. Don't recollect of testimony about poison before the inquest. A cup was produced with something in it, which was pronounced a remedy for a child. We examined no witness with reference to poison. Stomach was opened but no test was applied to its contents, at that time. Think I was present at Dr. Towle's office when the contents of the stomach were examined, but I cannot tell whether this was before or after or during the *post mortem*.

The fingers were flexed—the thumb flexed inside of fingers, and end of scarf between side of thumb and forefinger. The thumb was only a little under the forefinger. It was not moved that day to my knowledge. Took hold of left arm, but cannot say whether I moved it or not. Don't remember whether it was rigid or not, or whether there was rigidity of fingers. Took no minutes of the examination of the throat Wednesday. We had Dr. Brown there for that especial purpose.

Joseph G. Swan. These are the genuine signatures of Mrs. Harriet B. Swan. I saw her write each one of them.

[Papers marked Nos. 7, 8 and 9 and put in.]

Cross-examined. Understood Mrs. Swan, on the Sunday, a week before her death, made a contract with Gilman to sell him land near her house. Gilman

was to have the land run out and she was to get deed made.

Nelson Evans. Was at Mrs. Swan's the morning she was found dead. Got there at six. Mrs. Richardson and others were there. I saw this paper [No. 1] soon after I entered the house and examined it. Put it in an envelope in my pocket and kept it there until I delivered it to Dr. Towne, the coroner.

Cross-examined. First saw it lying on the testament on the window. Had heard it spoken of before I got there, and looked for it as soon as I got into the house.

Oscar McIntyre. Lived about a mile from Mrs. Swan's. Carried her to meeting Sunday, and on our return left her at her house. Was at her house the next morning, a little before 6. Mrs. Richardson was there when I arrived. Went into the bedroom with Mrs. R. to the bed where the body lay. Put my hand on the forehead and arm. Mrs. R. asked me if she was dead. I said she is and has been so some time. Did not disturb the body in any manner. Mrs. R. said she had loosened the scarf. Told her she had better not disturb anything more, but let it remain just as it was. On going out of bedroom, met prisoner at door. He asked if she was dead, and I replied she surely is. After we got into sitting room, as Mrs. Richardson was passing by the window, she said here is something that may throw some light upon it, and took up a piece of paper which lay on a testament. She and I read it together. This paper [No. 1] is the one. No one disturbed the body while I was there. Samuel F. McIntyre is

my son. He is away in the army.

Cross-examined. Andrew Evans and Oliver McIntyre came while I was there.

Oliver McIntyre. Got to Mrs. Swan's about 6; went with Andrew Evans. Saw Gilman there. He started for Andrew Evans's just before Andrew and I started away. Andrew told him he had not better go and tell Abba. He left and we followed. He went on beyond our house and then turned and came back there. Abba was then there.

Andrew Evans. Went to Mrs. Swan's about 6. Saw Gilman. He started away and I told him he had not better go and tell Abba. But he started and I went to Mr. McIntyre's. Gilman rode past there and then came back. Abba was there when he came within speaking distance. She said, "Oh Ephraim, you have killed my mother." He denied it. He stopped some ten minutes; cannot recollect all the conversation with Abba. Did not hear him ask her to go home.

Cross-examined. First heard of her death from Gilman. I was at McIntyre's when he came there the first time, and told of her death. When I left home Abba was there, but before I had got back to McIntyre's, she had come there.

Can't recollect all the conversation. I remember Abba told him she should always believe he committed the deed, and charged him with it several times.

T. C. Ward. At the inquest prisoner was asked if he would write in the presence of the jury. He said he had no objections and did write what is on this paper [No. 6]. Certain words were given to him to write, and he wrote them. The paper No.

1 was not shown to him. He wrote such words as he was asked to write.

D. L. Lamson. Reside in Fryeburg; am a physician; was present at the *post mortem* examination of Mrs. Swan, as one of the coroner's jury. Examined the external appearances of the neck. Saw scarf about the neck; don't think the marks on the neck were made by that scarf; don't think it possible to have made those marks with that scarf. There were no marks where the prominent bearings would have come, except over the larynx. Over the spinal column there were no marks, not even discoloration. The physicians on the jury conferred together and came to a conclusion as to the cause of death. I think it was asphyxia. From what I saw there, I came to the conclusion it was a homicide and not suicide, though I went there with the other opinion. In my opinion it is impossible for a woman to strangle herself with this scarf put on as this was. A person cannot strangle himself by choking himself with his hands. It is entirely against physiological rules. There is usually a relaxation of the limbs, in cases of this kind, before death, as soon as the will is lost. I think the relaxation would be enough to loosen the scarf in the hand before death—some time before circulation would cease. Generally the heart is the last organ which ceases acting.

If the death had been caused by this scarf, I should not expect to find these spots between the larynx and the prominent muscles of the neck, but upon the larynx and those muscles.

If the scarf had been between

the fingers and the neck, the crescent shaped marks would not have been there, but I should expect to see larger discolorations.

Cross-examined. Monday morning the limbs were not very rigid. The right arm was some rigid, not much. I examined it somewhat with a view of testing its rigidity. I examined the left hand particularly. The fingers were somewhat more rigid than those of the right hand, but I easily inserted a finger between them and the scarf. My finger went in with considerable friction, but I didn't use half the force I could have used. I had to overcome the rigidity of the fingers. This was Monday morning when I entered the room, between nine and ten o'clock. I did not bend the left arm. There is a relaxation of the muscles before death in cases of this kind, unless there are spasms, and then there is usually a relaxation. The will cannot be exercised. The *rigor mortis* is not at all connected with the will. The hand cannot be kept clenched after operation of will ceases. Spasmodic action does not depend on the will. All parts of body after death would stiffen about alike. In the morning before examination, I think the left arm was more rigid than right arm. It was not so well covered as right arm, which was mostly covered. Can't tell how much of right arm was covered.

Nathaniel S. Littlefield. Have seen Mrs. Swan write. I have her signature on this paper [marked No. 10], which I saw her write Oct. 25, 1858. Am a lawyer; been in practice nearly thirty-five years; have very often compared handwriting; within

10 years have frequently been called to testify as an expert in relation to handwriting. Know Mrs. Swan wrote No. 10, and from comparison I have no doubt she wrote Nos. 7, 8 and 9. I don't think No. 1 was written by the same hand. The "r's," however, to a certain extent, resemble the others, but only one or two. See certain characteristics in No. 1 that are in all of Nos. 2, 3, 4, 5, 6 and 11 [Gilman's signature to testimony before coroner's inquest]. The general appearance of them all is alike, as much as the person would write alike. No. 1 and No. 6 are the most alike and I am very confident about them, being the same words and apparently written about the same time. I have no doubt the hand that wrote No. 1 also wrote No. 6. I have seen them and compared them before.

Cross-examined. A person who writes but little will write most alike at different times.

George N. Comer. Reside near Boston; do business in Boston; am President of Commercial College where penmanship is taught as one of the branches; have been there twenty-one years; have given much attention to the comparison of handwritings, and made that the subject of close study and examination for the whole time; have been very frequently called into court as an expert in matters of handwriting; have critically examined Nos. 1, 7, 8 and 9. I don't think for a moment that the person who wrote the signature in Nos. 7, 8 and 9 wrote No. 1. Have before examined Nos. 2, 4 and 6. Nos. 1, 2, 4 and 6 were all written by the same hand. Have

no doubt whatever about it. In my examination I took No. 4 [Holt letter] as standard of comparison, as ordinary genuine handwriting. Examined all these papers in my office at Boston with a very powerful microscope, and by that means made myself familiar with the general characteristics of the writing of the writer of this letter. The irregularities of the formation of the strokes in the writing, both up and down strokes, came out very prominently under a powerful glass, and I find the same general characteristics in the writing in the letter and in No. 1. The glass I used was one of three hundred diameters. Have no doubt one hand wrote all four of these [Nos. 1, 2, 4 and 6].

Thomas A. Foster. I reside in Portland; am a physician and surgeon; am teacher of anatomy and surgery in the Medical School in Portland. Have recently given special attention to the subject of Medical Jurisprudence.

Have heard all the testimony in this case. My opinion is that the spots on the neck could not have been produced by the scarf, and that strangulation was not produced by it. In such case I should expect to find a continued indentation and abrasion (if any) and more distinct on the back of the neck than in front. I should also expect to find the scarf considerably tightened about the neck, more so than I have reason to believe from the testimony, it was in this case. If there was no abrasion of the cuticle, I should not expect to find discoloration. I should expect them to be found together.

There is usually before death

an irregular action by way of relaxation.

Have formed an opinion from the testimony as to whether this was a case of homicide or suicide. I consider it a case of homicide.

My first reason is, that the body seems to have been moved from the left to the right side after strangulation took place. The spot behind her head on the pillow leads me to think so. This spot was undoubtedly caused by the oozing out of bloody mucus from the mouth. I base this reason on the fact that after she had been strangled enough to produce the frothy appearance of her mouth, she would not have had power to turn herself on to her other side.

A right-handed woman would not naturally use her left hand in tightening the ligature or cord. No person, male or female, with this scarf around the neck as this was, could by the use of either hand produce death by strangulation. I think the deceased with both hands would not be able to do it, with this scarf, putting the ends together.

My fourth reason is based upon the spots upon the neck. The scarf could not have made these spots. I attach very much importance to the crescent-shaped marks near the larger marks and to the fact that these are such marks as we should expect to find in case of force applied to a person's throat with the hand. I should expect to find the abrasion on the more prominent parts of the neck and the skin more hardened than those on the yielding parts of the neck.

We expect to find in case of strangulation, discoloration and indentation in the track of the

ligature. If I found them on one part, I should expect to find them equally on all the prominent parts of the neck, which I fail to do in this case. If this was suicide there would be more abrasions behind the neck, occasioned by drawing the ligature, and the fact that the force would be directly applied to that part.

Have no idea that the crescent-shaped marks could be made with the hand over the scarf.

This scarf put on as this was, would loosen when there was a relaxation of the muscles.

Think it a physiological impossibility for a person with their own hand to produce death by strangulation, except by using the weight of the body.

Cross-examined. Think from the marks, the throat was grasped with one hand only. Discover no traces of more than one hand on the neck. All these marks would have been made by one hand. The crescent-shaped marks running into each other lead me to believe the marks were made by the hand, rather in any other way. Think the marks in front of this muscle (the prominent muscle on the side of the neck) not made directly by the ends of the fingers; they naturally slip down towards the larynx. In a case of strangulation by the hand, I should expect to find the marks under the ends of the fingers, and all along their course. Should expect the strangulation to be produced principally by fore and middle finger and the thumb; and one of the finger marks would be a little in front of the other, and one a little below the other. Should expect the principal pressure would

be made by pressing down on the larynx, and by the two fingers and thumb, as already stated. The little finger and the one next to it would have but little to do. In answering these questions, I assume she was lying upon the bed. My opinion is she was lying partially upon her left side. I think the grasp was once or twice relaxed with a working motion, and this with the pressure produced the abrasion over the larynx; and that the pressure was continued on the larynx the whole time, but with different degrees of force.

One symptom of strangulation is the congestion of the brain. We have in this case almost every symptom of pure strangulation. We also have symptoms that are always attendant upon apoplexy, and frequently upon strangulation without apoplexy.

It is possible to produce apoplexy and partial strangulation at the same time, by a cord round the neck. The detention of venous blood in the veins by a cord round the neck would cause apoplexy.

Mr. Wedgewood. Would not apoplexy be caused by a constriction round the neck? That result may happen. In cases of death by homicidal strangulation, would it not be accompanied by violent resistance? That would depend on circumstances. If the person attacked was awake, and standing or sitting, I should expect a good deal of resistance; if lying, although awake, much less; if lying asleep, very much less. If the person was lying, the opportunity for resistance would be comparatively small, and the opportunity for violence on the part of the person attack-

ing would be greater. I should in all cases expect a struggle. If an apoplectic result followed, it would have a tendency to counteract that. If the sides of the thyroid cartilage were pressed together, I should expect to find very apparent marks of violence. Its sides may be pressed together; and in that case I should expect to find marks of violence, such as we find in this case upon the skin. There might and probably would be an increased amount of blood in the tissues of the inner part of the larynx, if its sides were forcibly pressed together.

March 21.

Dr. Foster. Consider nearly all the symptoms in this case those of death by strangulation. I spoke yesterday of certain symptoms which may be found both in cases of apoplexy and strangulation, as there are certain symptoms common to a large number of diseases. Death sometimes commences at the heart, sometimes at the lungs, and sometimes at the head. In some cases we may have the peculiar symptoms of only one form of death, which would enable us to say positively that that was the form of death of which the person died. Or we may have leading peculiarities of a certain kind of death in company with symptoms common to other forms. In fact it is not common to have a case of death without some mingling of symptoms. If death commence at the brain, and be very sudden, the symptoms of asphyxia (death commencing at the lungs) may not be present. In cases of strangulation, or death commencing at the lungs, we do in a

large proportion of the cases find congestion of the brain.

There are some peculiar symptoms in pure strangulation, which are not found in cases of partial strangulation joined with apoplexy. There is one very peculiar symptom found in pure strangulation, which is not present in apoplexy, and which we may say is the last effort of life. In this case we have that symptom. It is the symptom of excitement of the genital organs—in males, as emission of semen—in females, the menstrual discharge. It is indicated in this case by the spot on the sheet under the body, and the appearances described by Dr. Brown and Dr. Towne.

Direct resumed. Do not think much importance can be attached to the dissection of the neck.

In cases of strangulation, we expect to find right cavities of heart distended—and left cavities empty. In apoplexy, all cavities of heart are found full.

In a case of strangulation like this, should expect to find the bedclothes disarranged. This leads me to the opinion that in this case the body was moved and the bedclothes adjusted after death took place.

Spasms of the muscles may be caused by excitement through the nerves leading to them, or from an inherent life—a life of their own—independent of the nerves. The last spasms of life usually found in cases of strangulation are the last efforts of life under the influence of the nerves. The rigidity found immediately after death is caused by this kind of spasms. The stiffness which comes on after death, spoken of

as *rigor mortis*, is occasioned by the inherent power of the muscle, independent of the nerves.

The former rigidity usually passes off before the latter comes on. The time at which the latter comes on after death, varies greatly in different cases.

George N. Comer (recalled). Have examined the signature to the testimony of the prisoner before the inquest. This and Nos. 1, 2, 3, 4 and 6 were all written by the same hand.

On examination of this signature under the glass, I find the capital G has been written over a G previously written. The first G is precisely identical with the capital G in Nos. 1, 4 and 6. That G was blotted with the finger.

The writing in Nos. 1, 2 and 6

is slightly disguised. The nervousness in No. 1 is seen in every part of it, when examined under the glass—a tremulousness in every part of it which indicates an attempt to disguise.

A person little accustomed to writing cannot so well disguise his hand as one more accustomed.

Any person who could have made No. 6 from No. 1, or No. 1 from No. 6, must have had a good deal of practice.

If a person had only seen No. 1, and was a good imitator, it would be impossible for him to make so good an imitation of it as No. 6 is.

I have examined the mark on upper part of No. 1, and it is the lower half of the letter E, as Gilman makes it in his signature.

The following is a *fac simile* of No. 1, the writing found by Mrs. Richardson.

Bea Good Children
for I am afraid of men
in this world

The following is a *fac simile* of No. 6, written by Gilman, in presence of Coroner's Jury.

Bea & Good children
for I am afraid of
men in this world

The following is a *fac simile* of No. 9, Mrs. Swan's signature written June 21st, 1860.

Harriet B Swan.

Irena March. Am sister of Mrs. Swan. She would have been forty years old, if she had lived till February. I saw her the Thursday before her death, when Abba and young Gilman were there. Abba then gave me a letter purporting to be signed by Gilman. I burned it, but read it to Mrs. Swan before I burned it. I recollect the subject matter of it and most of its content. It was a short letter.

John C. Harriman. Am brother of Mrs. Swan. Have seen this paper before (No. 4). I took it from the Post Office in a letter directed to me. It was from Thomas K. Holt. My wife wrote to him to have this letter sent

back. He is my wife's brother, and the brother of William Holt, who is now in the army.

Had bargained a pig to Mrs. Swan the Wednesday before her decease. The pig was to be delivered to her when I got ready to carry it to her. She said she wanted a pig, but didn't want one so early. I told her that would make no difference, I would keep it for a while, until I carried to her. Gilman came for the pig the morning she was found dead—at about half-past four. I was up. He said Mrs. Swan had sent for that pig. He didn't say much, said he was cold. He shook some, said it was very cold, looked cold, trembled.

HENRY HYDE SMITH, FOR THE PRISONER.

Mr. Smith. May it please the Court. This is a case of life or death, and it demands the wisdom and experience which only a long and intimate and thorough acquaintance with the principles and the practice of the law can bring. Therefore it is unfortunate for the prisoner at the bar, that this is my first attempt to argue a cause before a jury. But as evil may be overruled for good, deficiency for competency, I shall trust, while laboring under the weight of responsibility of this occasion and of this hour, that your Honor will see to it that the vital interests of my client receive no detriment at my hands.

Gentlemen of the Jury: The law presumes everyone to be innocent until he is proved to be guilty. This shining shield, protecting all alike, can be tarnished by no breath of suspicion; it can be perforated by no popular rumor of belief, nor even by the highest degree of probability, although in most instances "Probability is the guide of life." The proof of guilt must be so clear and convincing, as to establish the absolute truth of the charge preferred.

In all criminal cases, the burden of proof is constantly on

the side of the prosecution—it never changes. In capital cases, where the evidence is wholly circumstantial, the law demands of the Government that every material fact necessary to establish the guilt of the accused must be proved beyond a reasonable doubt.

We admit the death of Mrs. Swan—and further, that her death was caused by strangulation. The only question at issue in this trial is this: Was the death of the deceased a case of homicidal or suicidal strangulation? In other words, was she strangled by another, or by her own self?

The Government assume that this is a case of homicide, and that the prisoner is the guilty party.

Now, according to the well established principles of law, to which I have adverted, the Government must show that every material fact in evidence is in complete harmony with this theory for truth is always harmonious, and I had almost said harmony is but another name for truth.

The Government admit that up to the time of the alleged murder the defendant had been a young man of remarkably industrious habits, that he had sustained a good character, that he had always treated the deceased with uniform kindness and consideration. Now is it not unnatural, well-nigh impossible, that a young man like him, should fall at once from innocence to the lowest depths of guilt?

But the Government have failed to show that there was a sufficient motive to urge the prisoner to the commission of such a crime, inasmuch as the only objection the mother ever raised to the prisoner's marrying her daughter was that her daughter was too young to be married, and she was unwilling to be deprived of the company and assistance of her oldest child, now that her husband was no more. Is not this corroborated by another fact, to which Government have testified, that but a few days previous to her death, deceased sold prisoner a piece of land within a stone's throw of her own door; and beyond this, evidence can be adduced to show that the very last work the prisoner ever did, was in clearing this land for his future home.

Has the prisoner betrayed guilt by any act or word of his; or has his conduct been that of an innocent man?

He rose Monday morning at 4 o'clock—his usual hour—and did the very errand which he says deceased requested him to do, as they both were on the point of retiring Sunday evening. That this request was so made, the testimony of Calvin Harriman and Abby Swan clearly indicates. On his return he does his accustomed work—at the usual breakfast hour goes into the house—finds no one stirring—calls Mrs. Swan several times from the sitting room—knocks at her door—receives no response. He enters her bedroom—steps to the bedside—and to his horror, discovers the fatal scarf around her neck and in the grasp of the left hand, and the bloody mucus issuing from her mouth. These things, together with the deathlike pallor of her countenance, reveal to him the fact that she is dead. He immediately awakens Mary Eliza, the little girl nine years old, who was in bed with her mother. The little boy of two years he leaves undisturbed and runs to the nearest neighbor's for assistance. He then makes haste to inform the daughter of her mother's death.

He makes no effort to escape, although the chance was open to him. Before the Coroner's inquest, he testifies without reservation, although he knew he was suspected; he wrote without reluctance, the very words which were written on the slip of paper found on the window sill in the sitting room, with pen and ink near it. And permit me to add here that he spelt the words as nearly like those as he could remember, because he understood that to be the request.

He is reluctant to waive an examination before a justice although the network of circumstances and the feelings of the community were such that his counsel felt confident he could not be acquitted. This and his subsequent conduct point not to his guilt, but to his innocence.

The testimony is insufficient to prove homicidal strangulation.

There was no disturbance to awake the little boy in bed with the prisoner, or either of the two children in bed with the mother. The bedrooms were small, adjoining rooms, off

from the sitting room. There were no marks of violence on the person of the deceased except the abrasions around the neck; there were none at all on the prisoner.

The evidence fails to prove that there were marks of hands or fingers, or prints of finger nails on the neck of the deceased; or else admitting all this proved, the marks were so superficial and indistinct as to indicate rather the compression of her own hand, than the throttling grasp of the murderer, who would invariably use much more force than would be necessary to cause death by strangulation.

As to the paper found by Mrs. Richardson, which contained the words, "Be good, children, for I am tired of living in this world," the advice itself points to deceased as the writer. The handwriting closely resembles that of the prisoner, as we fully admit.

On the other hand, it resembles the handwriting of deceased.

We have only the signatures of deceased, as recent specimens of her handwriting, and the Government experts have testified, that the *r*'s, *a*'s and *w*'s have a particular resemblance to the corresponding letters in the signature. In letters of deceased written a long time ago, you can see that the spelling was far from being correct. In this connection, it should not be forgotten that the handwriting and orthography of a person temporarily insane, are as different from his handwriting and spelling when sane, as his other insane acts are from his sane.

Had prisoner written it, he would most likely have signed to the name of deceased and it is not unlikely that it would have contained a permission or request for Abby to marry him, for that was the thought which lay nearest his heart.

And more than all, the handwriting was pronounced by Abby herself, after carefully examining it two or three minutes, to be her mother's—she being at the time, and by reason of the circumstances, a most competent expert to decide whether the handwriting was her mother's or her lover's. Who could be a better?

But we are not forced to act simply on the defensive. The proofs that the deceased committed suicide are not wanting.

She was in quite destitute circumstances; she had several young children dependent on her for support. The times were hard; and the future was dark and gloomy to every true and loyal heart, for the very existence of our country seemed trembling in the balance. She had been quite ill for some time previous to her death. Were not these things sufficient to induce temporary insanity? But persons not unfrequently commit suicide when no cause whatever can be assigned.

The body when found was lying in a natural position, as if deceased were asleep. The hair was smooth; the eyes were prominent, and the face was bloated, indicating a voluntary as well as a lingering death. There were no contortions of limbs or features; the bedclothes were undisturbed; neither of the children in bed with her was awakened.

The fingers of the left hand were firmly clenched; the left arm was very rigid; all the other limbs were flaccid—showing that the rigidity of death had not yet set in. This rigidity proves conclusively that the arm must have been voluntarily flexed, and the fingers voluntarily clenched, just before death and during the death struggle; and hence it must follow from this fact alone, that this was not a case of homicide, but of suicide.

I now submit this cause to you, gentlemen of the jury, hanging the very life of the prisoner at the bar on your decision. I plead before you not for sympathy or pardon in his behalf, not even for “the quality of mercy,” but simply for justice and right—simply for a fair and impartial verdict.

THE WITNESSES FOR THE DEFENSE.

Dr. William C. Towle. Was present at the *post mortem* examination. First saw the body at half past 11 Monday. I examined the neck; found some spots on larynx near thyroid cartilage; did not notice any of the crescent-shaped marks which Dr. Brown speaks of, and did not hear them mentioned during the *post mortem* examination.

Laid my hand upon the throat, and when it was on so as to cover spots on right side with my thumb, I could not cover marks near spine on left side with my finger. In order to cover the spots it was necessary to bring my hand close up to the throat.

Examined the upper limbs when I first saw the body. The

left arm was then quite rigid. The right arm lay straight with the hand open, slightly flexed. The left arm was flexed at nearly a right angle. I took hold of both arms to see what rigidity there was. I found a difference in the degree of rigidity. The left hand was clasped, the flexor muscles being violently contracted. I think all the joints were closed naturally. The thumb was in position outside of finger. One end of scarf was in the hand, and one end tucked through. I introduced my finger into the clasped hand. There was considerable resistance in doing so.

Cross-examined. Some of the scarf passed through the hand, say half an inch or more. I did not notice the knot in the end of it. The hand was ten inches or less from chin.

Edward L. Osgood. Saw body of deceased about 9 o'clock. I looked at the neck to see the marks. I did not see such marks as would be made by finger nails. Also examined the neck between 11 and 12.

Cross-examined. According to my recollection she was lying on her left side.

Mrs. Clara Walker. Reached the house of Mrs. Swan between 6 and 7 o'clock in the morning when the body was found. It lay upon the right side, with face towards back side of bed. The left arm was bent at the elbow, forming about a right angle. The left hand held one end of the scarf. The right arm was extended on the pillow nearly straight. About two in the afternoon, I took hold of the left arm to see if it was rigid. It was rigid then. I did not succeed in bending the arm, but made no great effort to bend it. The fin-

gers were nearly closed. Did not notice position of thumb. The clench of hand was natural. It was firmly closed. Examined the arm no further than to find it was rigid. Examined right arm and could easily move it. It was easily bent.

The bedclothes were quite smoothly spread, and came up above elbow close to her shoulders. I assisted in moving them. Found her lower limbs lying naturally. There was difficulty in moving the under sheet. The feet lay upon a fold in that sheet.

Saw the paper found there—No. 1. Abba Swan saw it that morning. I cannot tell whether she took it in her hands, or looked on when somebody else held it. She looked at it some two minutes—not longer—and said, "Yes, that is mother's writing."

Cross-examined. She made this remark about 7 o'clock; calm and quiet at that time. She had not been so, and did not continue so. I don't recollect of her adding anything else. I don't mean to say she looked at it two minutes. That would seem a long time. I don't mean to state the length of time.

Dr. Simon Fitch. Reside in Portland; am a physician. In cases of death by violence, *rigor mortis* comes on a longer time afterwards than in natural death. It is not liable to be unequally distributed, but its distribution is uniform, commencing first on neck, then proceeding to upper limbs, and then to lower limbs.

Have heard the testimony of Dr. Towle and Mrs. Walker. Believe the difference in the rigidity of the arms, as testified by them, was not occasioned by the *rigor mortis*. That rigidity could not

have been the *rigor mortis*. Had it been *rigor mortis*, the first spasmodic stiffening would have passed off, and the *rigor mortis* would have stiffened both arms alike. The clutch of a drowning man to a person who comes to him will last till after death. This may unquestionably proceed from an act of the will, and the clutch continue until after insensibility occurs, and the rigidity continue. If in such a case the fingers are partially opened after death, I think they would remain in nearly the position in which they were forcibly placed after death. If opened, the hand would not be closed again.

If a man was choked by the hand, the soft parts in the neighborhood of the parts compressed would be palpably injured. Invariably if a man is killed by a murderer, much more violence is used than is necessary. Generally when a man is choked to death by the hand there is a breaking up of the tissues; there are deeply indented marks of fingers; the skin is broken through, the blood vessels are broken and blood is poured out. Often the larynx is broken and sometimes the bone. It is the rule that the murderer uses inexpressibly more violence than is necessary to accomplish his object.

Think the sides of the cartilage of the larynx could not be brought together so as perfectly to prevent respiration, without exhibiting marks of violence afterwards. As age advances, there is a tendency to a hardening of the larynx; sometimes it becomes ossified or in a bony state, so that a person may be suspended by the neck some time without suffocation. The elasticity of the walls of the windpipe depends on

the age of the subject; at maturity they may be broken by a blow. Remember no case where they were broken by pressure.

Suicide is often committed without any particular motive beforehand; frequently when we least expect it, though afterwards indications of it are remembered, which are not noticed at the time. Very powerful mental emotions will sometimes cause such a condition of the brain as to cause suicide. Frequently the intent exists but a short time before—sometimes is suddenly formed, sometimes transient, sometimes persistent.

This scarf, put on as this is said to have been, might be constricted so as to cause death. There is no insufferable difficulty. In such case, the contraction might be continued through the death struggle and perpetuated in the dead body.

If strangulation was caused by this scarf, think it possible there might be superficial, but not deep seated abrasions. It would hardly produce abrasions of more than scarf skin. The constriction might display itself in and beneath the true skin. If the scarf were drawn about the neck so as to produce partial strangulation, congestion of the brain might set in so as to produce death from both causes, and death might commence in the brain and lungs at the same time. In case of homicidal strangulation, there would evidently be violent resistance on the part of the person attacked, both voluntary and involuntary. There would be the same appearance on the external surface of the internal organs, whether death were produced by strangulation or apoplexy.

Think the difference could be detected only by measure or absence of external injury about the throat.

There would be a difference between the voluntary struggles in homicide, and those in suicide. The involuntary struggles would be the same.

George F. Booth. Was at Mrs. Swan's house between 6 and 7 the morning after she died. Abba was there she said that paper [No. 1] was her mother's writing. Cannot say how long she examined it—a minute perhaps.

Elvira Gilman. Am step-mother of prisoner. Live about two miles from Mrs. Swan's. Used to be at her house frequently. She has been at mine two or three times; made some calls; was there in May. I had a conversation with her.

[*Mr. Drummond* objecting to the admission of this conversation, unless the counsel for the defense would withdraw their objection to Mrs. Swan's declara-

tions on the Sunday of her death, they after consultation concluded not to offer this evidence.]

Dr. Fitch (recalled). If the contraction of the left hand was made after death, it would not remain, unless held until *rigor mortis* came on. If put in that condition during life it would not remain so, unless by act of the will. If a part of the body is exposed to the cold, it makes no difference in coming on of the *rigor mortis*.

Dr. Towle (recalled). In my opinion the left hand must have been placed in that position during life; and its remaining so was the result in my judgment of conscious action.

Dr. Fitch (recalled). Took my medical degree in Edinburgh, but have studied also in London and Paris. I have given a good deal of attention to medical jurisprudence. I studied under Christison, the distinguished author of the work on poisons, Trail, the eminent writer on Medical Jurisprudence, and others.

Mr. Wedgewood commenced the closing argument for the prisoner, and spoke half an hour, when he suspended and court adjourned.

March 22.

Mr. Wedgewood resumed his argument at nine, and closed it at one, when the court adjourned till two.

At quarter past two, *Mr. Drummond* commenced his closing argument for the State, and closed at half past three.

JUDGE GOODENOW immediately commenced his charge, and committed the case to the jury at four p. m.⁶

The indictment, the scarf, and all the papers which had been put into the case, were then delivered to the jury, the officers in charge were sworn, and the jury retired.

⁶ No report was made of the closing arguments or the charge.

At 7 o'clock, one of the officers in charge of the jury informed the *JUDGE* that the jury had agreed upon a verdict.

The *Jury* soon came in and took their places. Their names were called by the *Clerk*, and each one responded.

The *Clerk*. Gentlemen of the jury, have you agreed upon a verdict? We have.

The *Clerk*. Who shall speak for you? Our foreman.

The *Clerk*. Prisoner, stand up, hold up your right hand, and look upon the jury. Mr. Foreman, look upon the prisoner. What say you, Mr. Foreman, is the prisoner at the bar guilty, or not guilty, as charged in the indictment?

The *Foreman*. Guilty.

The *Clerk*. Of which degree?

The *Foreman*. Of murder in the first degree.

The verdict was then affirmed, and the *Jury* discharged.

A Bill of Exceptions to the admission of Gilman's testimony before the coroner's inquest was tendered and allowed.

The *Prisoner* was remanded, and court adjourned.

The appeal was argued in the Supreme Court and in May, 1863, the judgment of the Trial Court was affirmed, *Mr. Justice Rice*⁷ delivering the opinion of the Court, holding that the prisoner's confession was properly admitted in evidence.⁸ Gilman was thereupon sentenced to imprisonment for life and he entered the State Prison at Thomaston, Maine, on August 27, 1863. He was pardoned and left the prison on December 13, 1906.

⁷RICE, RICHARD DRURY. (1810-1882). Practiced law, Augusta, Me.; Judge, Supreme Court, 1852-1863; Overseer, 1860-1877.

⁸State vs. Gilman, 51 Me. 206.

**THE TRIAL OF JOHN SCOTT, JEWITT PRIME,
SAMUEL WYNANT, OLIVER BANCROFT,
JACOB S. MILES AND PATRICK
HILDRETH FOR RIOT AND
ASSAULT, NEW YORK
CITY, 1817.**

THE NARRATIVE.

There were strange scenes witnessed in the Rose Street Baptist Church, in New York City, one Sunday evening in the winter of the year 1817. For some time there had been trouble in the House of God; only a month before the minister had been obliged to publicly reprimand from the pulpit one of the congregation for loud talking during the service and more than once small boys had had the temerity to set off firecrackers in the middle of the sermon. The Rev. Mr. Broad had become so disgusted with the state of affairs that on this day he had closed the church for the time and had gone to attend another. But from this he was suddenly called by word that a lot of people had got into his church building and were making a great row. He hurried there with a watchman, found a crowd outside and a real riot going on inside and he was told that all kinds of irreverent things had been done there that evening. At his appearance most of the rioters left very quickly by the back doors, but five young men who were not able to get out before the constables arrived were arrested and taken to the lockup. Indicted and tried for riot and assault, they pleaded that they had gone into the church to see what was going on but had taken no part in the disturbance. There was no evidence to contradict them and when the judge charged the jury that it does not follow that because a man is present where a riot is going on that it is to be presumed he was one of the rioters and that in this case none of the prisoners could be found guilty without proof that he or they took an active part in the riot either

by doing some riotous act or by aiding, abetting or assisting others to do such act, they returned a verdict of acquittal and all the prisoners went free.

THE TRIAL.¹

In the Court of General Sessions, New York City, February, 1817.

HON. JACOB RADCLIFF,² Mayor.

March 3.

At a previous term an indictment had been returned by the Grand Jury charging the persons placed on trial today with riot and assault and battery in the Baptist Church in Rose street. Their names are John Scott, Jewitt Prime, Samuel Wynant, Oliver Bancroft, Jacob S. Miles and Patrick Hildreth. They all pleaded *Not Guilty*.

*Hugh Maxwell*³ and *William M. Price*,⁴ for the People.

*John King*⁵ and *John Anthon*,⁶ for the Prisoners.

THE EVIDENCE.

Amos Broad. I am the pastor of the Baptist church in Rose street, No. 51, and have been so for seven years except for about a year. There had been much noise and disturbance in the church for some time on the Sabbaths. This had caused me to give up divine service therefor a time. On the afternoon of the 4th of last February, Sunday, I had given notice that there would be no service in the evening in the church, and I was attending a service in John street in the

evening when I got word that the Church in Rose street had been broken open. I hurried to the place; found more than a hundred people in the building and two or three hundred outside; the church was lighted; there was much tumult and confusion; people on the outside were calling out to those inside and shouting to them to commit violence; a watchman came with me, but when we tried to enter the church one of the mob knocked him down and he never

¹ New York City Hall Recorder. See 1 Am. St. Tr., 61.

² See 1 Am. St. Tr., 61, 361, 671, 717.

³ See 1 Am. St. Tr., 62, 362, 675, 718.

⁴ See 5 Am. St. Tr., 360.

⁵ KING, JOHN. Born 1775. Representative in Congress, 1831-1833. Died in New Lebanon, N. Y.

⁶ See 2 Am. St. Tr., 787.

got in. Some of my friends helped me to close and fasten the outer doors and we waited for the constables. Expecting their arrival, most of those in the church ran out by a back door so that when the watchmen came there was hardly anyone in the church but the prisoners. The inside of the church was much damaged. Some of the walls were broken, the organ was badly damaged and the hymn books were scattered around everywhere. All these prisoners were in the building when I got there.

Cross-examined. I cannot designate any particular act done by any one of the prisoners of my own knowledge, only what other people told me; all of them denied that they had done anything when the watchmen arrested them; they went voluntarily with us to the watch house.

John Smith. I was in the church that night; the rioters acted horridly; they thumped on the organ, broke the keys; a negro

boy got into the pulpit and pretended to preach, to the amusement of the crowd.

For the defense *witnesses* testified that the sexton of the church, after the service in the afternoon, had become intoxicated, and left the doors unlocked. Some evil-minded persons, whose names were unknown, finding that access could be obtained, entered the church and lighted it, and a number of other persons, among whom were the prisoners, afterwards came, either under an idea that divine service would be performed, or that a singing meeting, as had been usual, was to be held there that evening. During the time of the continuance of the prisoners in the church, their behaviour was orderly, and they remained quietly seated the principal part of the time they remained there; and were so seated when the watchmen came and apprehended them.

It was further proved that they were young men of sober, industrious habits.

The COURT expressed an opinion that the prosecution could not be sustained, unless it could be shown that the defendants took an active part in the riot, or were aiding, abetting or assisting them in the riot.

Amos Broad, Jr. I am the son of Rev. Mr. Broad. Am thirteen years of age; on the evening of 5th January a meeting was held in the church; and while father was preaching, I was standing up directly before Hildreth, the prisoner here, to watch certain boys who fired crackers, and give notice to the sexton. While I was talking to another boy, and desiring him to tell the sexton something concerning those boys who fired crackers, Hildreth

from behind tapped me on my head with his cane, and told me not to make that noise. He did not hit me hard.

Amos Broad. On the evening my son speaks of I heard Hildreth talking loud, and called him by name from the pulpit, and said I wondered how a man of his standing could thus conduct himself.

Next day Hildreth with another came to my house, and Hildreth used much provoking lan-

guage to me, because I spoke to him publicly the evening before. After he came to the house on Monday morning, my lad told me about the tapping on the head.

The Counsel for the Prisoners declined addressing the jury.

Mr. Maxwell contended that the defendants ought to be found guilty, because they were in the church, previous to the time the outrage complained of occurred, and took no steps in discouraging or suppressing the tumult. Their silence, on such an occasion, indicated their assent to the shameful conduct of others, with whom they were equally guilty. In this country every citizen had a right to worship the Supreme Being according to the dictates of his own conscience, and every denomination of Christians were, and ought to be, protected by law, from insult and aggression. Therefore, in this case, the great interests of religion were affected, and he urged the jury by their verdict to discountenance the malignant persecuting spirit which had been manifested towards an in-offensive citizen, and thereby prevent others from the commission of similar enormities.

The MAYOR in charging the jury said that the Court had observed, with some surprise, the zeal manifested by the counsel for the prosecution in his remarks.

The Court did not consider this a case in which the rights of conscience, or the important principles of religion, could, by any possibility, come in question or be affected. The simple question for the determination of the jury was, whether the defendants were guilty of a riot, either by taking an active part themselves, or in aiding, abetting, or assisting others, in the commission of such riot. According to the view which the Court had taken of the circumstances in this case, the testimony would not warrant a verdict against the defendants. A great number of persons had assembled in the church at the time the riot was committed. No previous concert had been shown on behalf of the prosecution, between the defendants or any other persons, to assemble for any unlawful purpose; nor had it been proved that the defendants committed any act of riot or violence in the church, or had, in any manner, aided, abetted, or assisted others, in the commission of the outrage.

The mere circumstance of being present in the church during the evening in which the riot occurred, without taking an active part in suppressing the riot, could not, in the opinion of the Court, render the defendants guilty of a riot. Could the defendants, for that reason, be convicted, there is no man in the community, who happens, inadvertently, to be among a multitude where a riot occurs, but that may be prosecuted and punished as a rioter, however innocent his intentions and conduct may have been; if the doctrine contended for by the counsel for the prosecution be correct, then every person in that church, whether he came to attend divine worship, or for any other purpose, is liable to be prosecuted for, and convicted of a riot. In the opinion of the Court, the idea is inconsistent with reason, and contrary to law. The Court, therefore, charges the jury, that if they believe that the defendants did not take an active part in the scandalous proceedings of that evening, and were not aiding, abetting, or assisting others in those proceedings, to acquit them.

According to the testimony, in this church divers riots and disturbance had taken place previous to the time laid in the indictment. The Court considered it of vast importance in the community, and the sacred cause of religion required that ministers of the Gospel should maintain that dignity of character calculated to command respect from the people; and where neither the character nor sacred functions of a divine were sufficient to command that respect, or, at least, to secure him from insult and aggression in his own church, it were much better for the interests of religion that he should relinquish the employment.

The *Jury* returned a verdict of *not guilty*.

THE TRIAL OF JONATHAN ROBBINS FOR EXTRADITION UNDER A TREATY WITH GREAT BRITAIN, CHARLESTON, SOUTH CAROLINA, 1799.

THE NARRATIVE.

The first treaty between the United States and Great Britain on the subject of Extradition—the Jay treaty of Amity and Commerce of 1794—stipulated for the surrender of fugitives charged with murder or forgery on such evidence of criminality as would justify commitment for trial, but it did not provide for any judicial examination of the charge nor was there any Federal statute regulating procedure in such cases.

Toward the middle of February, 1799, the American schooner *Tanners Delight* arrived at the harbor of Charleston, South Carolina. She had not been many days in port when at the request of the British Consul one of the crew was seized and hurried to jail. He was accused of being Thomas Nash, a British subject and a member of a crew which two years before had risen on the officers of the British frigate *Hermione*, massacred them and taken the ship to a Spanish port where they had sold her. In due time a demand was made by the British Government for the surrender of Nash according to the provisions of the Jay treaty and the President¹ wrote a letter to Judge Thomas Bee of the Federal Court in South Carolina requesting “him to deliver Nash up to the consul

¹ ADAMS, JOHN. (1735-1826). Born Braintree, Mass. Graduated Harvard, 1755; admitted to bar, 1761; member Massachusetts Assembly, 1770; member Continental Congresses, 1774, 1776; Commissioner to Court of France, 1777-1779; member Massachusetts Constitutional Convention and successively United States Minister to Holland, France and England; first Vice-President (1789-1797), and second President of the United States, 1797-1801. His life and writings in ten volumes were edited by his grandson. Died in Quincy, Mass.

or other agent of Great Britain who shall appear to receive him."

The British demand was grounded on the affidavits of two men, one a sailor who was with the prisoner on the *Tanners Delight*, had heard him admit that he was the boatswain's mate on the *Hermoine*, and when deep in his cups exclaim "bad luck to her" and clinch his fists; the other a midshipman on the *Hermione* who identified him as one of the mutineers of the frigate. But the prisoner swore that he was not Thomas Nash at all; that his name was Jonathan Robbins; that he was an American citizen born in Danbury, Connecticut; that he had been pressed from the American brig *Betsy* by the commander of the *Hermione* and kept there until the crew rose, captured the frigate and took her to Spanish port.²

The case caused great excitement throughout the country, leading lawyers volunteered their services to defend the prisoner and when the trial came on they argued that no treaty could take away the right of a resident of this country to be tried by a jury of this country; that neither the treaty nor any Federal statute gave the court any power to act in the matter, and finally that the treaty could not be construed to include an American which Robbins clearly was. But Judge Bee held that a treaty was a law which the courts were bound to recognize; that a Federal court had power to enforce a Federal law and that it did not matter whether Robbins was an Irishman or an American as the treaty was intended to embrace fugitives from justice without regard to their nationality. So he was surrendered; taken back to England, tried by court-martial, convicted and hanged.

THE TRIAL.³

In the United States District Court, Charleston, South Carolina, August, 1799.

HON. THOMAS BEE,⁴ *Judge.*

² McMaster Hist. People U. S., II., 446.

³ *Bibliography.* *Wharton's State Trials. See 4 Am. St. Tr., 616; Hall, Jour. of Jur., 18; Bee's Admiralty Reports, 266.

⁴ BEE, THOMAS. Born South Carolina, 1729. A revolutionary

August 23.

The question before the court was grounded on a *habeas corpus*, to bring up *Jonathan Robbins*, who was committed to jail in February, 1799, on suspicion of having been concerned in a mutiny on board the British frigate *Hermione*, in 1791; which inded in the murder of the principal officers, and carrying the frigate into a Spanish port; and on a motion by *counsel*, on behalf of the consul of his Britannic majesty, that the prisoner should be delivered up (to be sent to Jamaica for trial), in virtue of the 27th article of the treaty between the United States and Great Britain, which article runs thus:

"Art. 27. It is further agreed that his majesty and the United States, on mutual requisitions, by them respectively or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other: provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive."

Mr. Ward for the Government of Great Britain.

Mr. Ker and *Colonel Moultrie* for the Prisoner.

THE EVIDENCE.

The evidence submitted to the Court was all in the form of affidavits as follows:

William Portlock, a native of portsmouth, in the State of Virginia, upwards of eighteen years old, saith that he went out before the mast in the schooner *Tanner's Delight*, which was commanded

by Captain White, who arrived here about three weeks ago; that a person who answered to the name of Nathan Robbins, came also in the said vessel before the mast, with him; that he, the said Robbins, is a tall man, middle size, had long black hair, dark complexion, with a scar on one

patriot and member of Continental Congress; member of State Assembly and Speaker; member of Privy Council and State Judge; Lieutenant-Governor, South Carolina; United States District Judge, 1790-1812. Author of Reports of the District Courts of South Carolina.

of his lips; that on or about last Christmas night he was present, and heard the said Robbins talking, in the harbor of the city of St. Domingo, to some French privateersmen who were on board the *Tanner's Delight*, when and where he informed them, in his hearing, that he, the said Robbins, was boatswain's mate of his Britannic majesty's frigate *Hermione*, when she was carried into the port Cavillia, and added that they had no occasion to take any notice of that. And after the above time, sometimes when he was drunk, he, the said Robbins, would mention the name of the *Hermione*, and say, bad luck to her, and clench his fist.

Lieutenant John Forbes deposeseth, that a person confined in the jail of this district, who calls himself *Nathan Robbins*, but whose real name this deponent believes to be *Thomas Nash*, was a seaman on board the *Hermione* British frigate, in which this deponent was a midshipman from the 8th of February, 1797, until the 30th of August following, during which time the said *Nash* was personally known to this deponent; that this deponent was removed from the said frigate to the sloop-of-war *Diligence*, on the said 30th day of August, 1797; this deponent further deposeseth, that on the 19th of September

following, he was sent on board the said frigate, at which time he saw and left the said *Nash* in the same station on board that vessel, as he was at the time of this deponent's being a midshipman therein. That on the 22nd day of the said month, the crew mutinied on board the said frigate, killed the principal officers, piratically possessed themselves of her, carried her into *Laguyra*, and there disposed of her to certain subjects of his Catholic majesty. That the said *Thomas Nash* was one of the principals in the commission of the said acts of murder and piracy, whose conduct in that transaction has become known to this deponent by depositions made and testimony given in courts martial where some of the said crew have been tried.

JUDGE BEE had received a letter some days before, from the Secretary of State of the United States, mentioning that application had been made by the British minister, *Mr. Liston*, to the President, for the delivery of the prisoner under the 27th article of the treaty, and containing these words—the President “advises and requests” you to deliver him up.

This letter though not read in court was shown to the *counsel* on both sides.⁵

⁵ The letter and the Judge's reply were as follows:

Department of State, Philadelphia, June 3, 1799.

Sir—*Mr. Liston*, the Minister of His Britannic Majesty, has requested that *Thomas Nash*, who was a seaman on board the British frigate *Hermione*, and who, he is informed, is now a prisoner in the jail of Charleston, should be delivered up. I have stated the matter to the President of the United States. He considers an offense committed on board a public ship of war on the high seas to have been committed within the jurisdiction of the nation to

The following affidavits were produced in behalf of the prisoner:

By this public instrument, be it known to whom the same doth or may concern, That I, *John Keese*, a Public Notary, in and for the State of New York, by letters patent under the great seal of the State, duly commissioned and sworn; and in and by the

said letters patent invested "with full power and authority to attest deeds, wills, testaments, codicils, agreements, and other instruments in writing, and to administer any oath or oaths, to any person or persons," do hereby certify that Jonathan Robbins, mariner, who hath subscribed these presents, personally appeared before me, and being by

whom the ship belongs. Nash is charged, it is understood, with piracy and murder, committed by him on board the above mentioned British frigate, on the high seas, and consequently "within the jurisdiction of His Britannic Majesty," and therefore, by the 27th Article of the Treaty of Amity with Great Britain, Nash ought to be delivered up, as requested by the British Minister, provided such evidence of his criminality be produced as, by the laws of the United States or of South Carolina, would justify his apprehension and commitment for trial, if the offense had been committed within the jurisdiction of the United States. The President has, in consequence thereof, authorized me to communicate to you "his advice and request," that Thomas Nash may be delivered up to the Consul or other agent of Great Britain who shall appear to receive him.

I have the honor to be, etc., etc.,

Timothy Pickering.

The HON. THOMAS BEE, Judge of the District Court of South Carolina.

Charleston, South Carolina, 1st July, 1799.

In compliance with the request of the President of the United States, as stated in your favor of the 3rd ult., I gave notice to the British Consul, that at the sitting of the District Court on this day, I should order Thomas Nash, the prisoner charged with having committed murder and piracy on board the British frigate *Hermione*, on such strong evidence of his criminality as justified his apprehension and commitment for trial, to be brought before me on *Habeas Corpus*, in order to his being delivered over, agreeably to the 27th article of the Treaty of Amity with Great Britain.

The Consul attended in court, and requested that the prisoner should remain in jail until he had a convenient opportunity of sending him away. I have therefore directed that he remain in prison until the Consul shall find it convenient to remove him.

I have the honor to be, with great respect,

Your most obedient servant,

Thomas Bee,

District Judge of South Carolina.

Hon. Timothy Pickering, Secretary of State.

me duly sworn, according to law, deposed that he is a citizen of the United States of America, and a native of the State of Connecticut, five feet six inches high, and aged about twenty-three years. And I do further certify that the said Jonathan Robbins, being a citizen of the United States of America, and liable to be called in the service of his country, is to be respected accordingly, at all times by sea and land.

Jonathan Robbins, mariner, a prisoner now in custody of the marshal of the District Court of the United States for South Carolina, being duly sworn, saith he is a native of the State of

Connecticut, and born in Danbury in that State; that he has never changed his allegiance to his native country; and that about two years ago he was pressed from on board the brig *Betsey* of New York, commanded by Captain White, and bound for St. Nicholas Mole, by the crew of the British frigate *Hermione*, commanded by Captain Wilkin-son, and was detained there, contrary to his will, in the service of the British nation, until the said vessel was captured by those of her crew who took her into a Spanish port by force: and that he gave no assistance in such capture.

THE ARGUMENTS.

Mr. Ker, against the motion, expressed his regret that the short time he had given to the consideration of the prisoner's case did not enable him to pay it that attention which its importance required; that whether it were considered as simply relating to the prisoner or in a more extensive view as embracing great constitutional principles, in its relation to the citizens of America, in either case it must appear as a question of the highest magnitude, and requiring the most serious discussion. *Shall a citizen of America be tried by his country, or be delivered up to a foreign tribunal?* He hoped he should be able to show the court that the prisoner's case was not within the 27th article of the British treaty; and if it were, that it was unconstitutional. The prisoner's certificate and affidavit, he contended, were proof of his having been impressed into the service of his Britannic majesty. By the late President's proclamation of neutrality, the citizens of the United States were prohibited from entering into the service of any of the belligerent powers; that the Court could not presume, without the color of evidence, that the prisoner had violated the laws of his country, unsupported as such a presumption would be by any legal charge of that

nature against him. Hence it follows that the prisoner must have been taken forcibly into the service of his Britannic majesty, in the face of his protection, and in contempt of our neutrality. Let those who make the requisition that he be delivered up show by the ship's articles, or by any other legal testimony, that he entered voluntarily into their service, and submitted himself to their discipline. If they cannot, the presumption is strong in favor of the prisoner. Taking the point then as ceded, that he was impressed, he was warranted by the most sacred rights of nature, and the laws of nations, to have recourse to violence in the recovery of that liberty of which he had been unjustly and unlawfully deprived. These were facts proper to be submitted to a jury of this country; they would well know how to appreciate a defense of this nature, if it were necessary to make it. The Court know that in England a man would be excusable for murder in resisting a press-gang; but here, the prisoner being an American, his rights ought to have been peculiarly respected by a foreign nation, and resistance on his part was not merely the exercise of the rights of an individual, but it was a duty he owed to his country. The principle contended for was supported by the best authorities. It is laid down in Vattel, book 3, chap. viii. sec. 139, "an enemy attacking me unjustly, gives me an undoubted right of repelling his violence, and he who opposes me in arms, when I demand only my right, becomes himself the aggressor, by his unjust resistance; he is the first author of the violence, and obliges me to make use of force for securing myself against the wrongs intended me, either in my person or possessions. For if the effects of this force proceed so far as to take away his life, he owes the misfortune to himself; for if by sparing him I should submit to the injury, the good would soon become the prey of the wicked."

The Constitution of the United States of America has expressly secured to every citizen thereof the trial by jury, and if the treaty went to deprive him of it, it would be invalid; it is inferior and subordinate to the Constitution, and when it unhappily stands in hostility against it, or where

there is a collision, it must, of necessity, yield. Treaties, however sacred, with whatever good faith they ought to be preserved, however high their authority, are not to receive a construction hostile to the sound principles of the constitution, and derogatory to the rights of the citizen. It is a general maxim in the construction of treaties that every interpretation which leads to an absurdity ought to be rejected; Vattel, book 2, chap. xvii., sec. 282, says, "that we should not give to any peace a sense from which follows anything absurd, but interpret it in such a manner as to avoid absurdity."

Can it be supposed that it was the intention of the contracting parties to deprive the citizens of America of the trial by jury, on which are bottomed the best principles of American freedom? Certainly not; it is an unfair and inadmissible inference. Hence it follows, that a citizen ought not to be delivered up to a foreign tribunal for any offense which is within the jurisdiction and cognizance of his country. The atrocity of the crime with which the prisoner is charged has nothing to do with the principle contended for; the requisition could be made with equal propriety, were it of a trivial nature. Piracy and murder is an high offense against all nations, and all nations have an interest in bringing offenders to justice, and all are equally competent to try them. A requisition is made under the 27th article of the treaty, to deliver up a citizen of the United States, on a vague allegation contained in two affidavits, which afford a mere suspicion of the prisoner having been on board the *Hermione* frigate at the time of the mutiny. If a citizen can be delivered up on ground so slight, in the present general political conflict among mankind, when the violence of party spirit knows no bounds; when vindictive passions are substituted in lieu of reason, justice and humanity; no man, however prominent and respectable among his fellow-citizens, can be secure against the operation of this law. The prisoner is an obscure character, and, although in the bosom of his native country, from the nature of his profession, being constantly removing from one place to another, is as destitute

of friends as if he were on the opposite side of the globe.

Mr. Ker contended that the words in the treaty "murder or forgery committed within the jurisdiction of either," manifestly implied the exclusive jurisdiction of the one or the other power, and not the jurisdiction of the high seas, where the United States have a concurrent one in common with all nations; that the laws of nations provide against offenses committed on the high seas, and therefore a particular stipulation was unnecessary; that the apparent object of the article was to bring some offenders to justice, and therefore provided against the crimes of murder and forgery being committed within the exclusive jurisdiction of either; but that the law did not apply in the present case, as the United States possessed competent power to try the offender, and bring him to justice; that if the offense had been committed within the kingdom of Great Britain, under the municipal laws of that country, the article affords a remedy, as our laws could not reach the offense; and further, that a construction should not be given to the treaty which abridged the jurisdiction of the United States, and that we ought not to presume that the Government of the United States had abandoned any of its judicial rights to any nation, and that neither the letter nor spirit of the article warranted the conclusion.

Col. Moultrie, for the prisoner, after premising the importance of this case, and stating it as one in which the dearest interests of the Union were involved, advanced the following grounds for consideration:

1. That the Constitution of the United States contained the constituent principles of our social union as a nation; that it is the compact by which our Government was formed, and under which alone it exists; and that from this compact, all civil power and authority, and every constituted branch of our society, as a nation, was derived, and is exercised; that mankind, in quitting a state of nature for that of society, gave up part of their natural rights, which they all possessed in common, to promote the good of the whole, and to secure the remainder which were not surrendered; that the natural rights so given up, were either totally relinquished,

or were modified only under restrictions, and became political rights; and those not given up formed a sacred residuum in the hands of the people, and which are unalienable by any act of legislation; that this was no visionary theory of ancient writers, but is the true and modern ground of all social union; and it is fully recognized in our free Constitution; for by article 12th, of the amendments to our Constitution, it is declared "that all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." And the 11th section declares, "the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."

2. Treaties and laws made by legislatures, he said, were only acts of the constituted agents and subordinate ministers of the Constitution; that they were of derivative authority only, and derived from the primitive authority of the Constitution, and therefore must be subordinate to, and could not counteract or control it; and that the treaty making power was derived only from the Constitution, is evident from the 2nd section of the 3rd article, which creates and gives it.

Col. Moultrie next pointed out the absurdity of the treaty making power being allowed to counteract or control the Constitution; as by that means, by a treaty, our Constitution, the very foundation of our government and guardian of our liberty, might be upset and destroyed, and every sacred right of the people secured thereby laid prostrate; and this, too, at any time and by combination with a foreign power; that no institution or sacred compact of the people for the preservation of their happiness could be formed, but what thus, by the creatures of the constitution and of the people's power, might be upset; that thus, though the Government and Nation might be called independent, the people might be slaves, and be in fact without any protection to their liberties.

3. That what the nature or denomination of the offenses specified in the treaty were, was totally immaterial; for if the

treaty-maker could insert one offense, he may insert as many more as he pleases; but the principle was, whether he had a right, for any offense, to oblige a citizen to be given up as a victim to any foreign power; a citizen, whose very liberty consisted in its being guarded by the sacred trial by jury.

4. That the 6th article of the Constitution itself shows that no law or treaty can be the law of the land, that is contrary to the Constitution; inasmuch as it says, expressly, that laws only "made in pursuance thereof," and "all treaties made under the authority of the United States," are the law of the land. The question then was, what was the "authority of the United States?" Whence was it derived, and the United States itself created, but only by and from the Constitution itself?

That the Constitution, and laws and treaties of the United States, being the supreme code of the law of the land, was evidently intended by the 6th article (as expressed), to be only as supreme to the local constitutions and laws of each State; but such laws and treaties stand on an equal footing; and both must be made in pursuance of, and under the authority of the Constitution.

That two supremes are of equal authority, and both must be equal; that two equal forces, or powers, acting in opposition, destroy each other; and if not equal, one or the other must be superior (either the Constitution or treaty), and that all laws and treaties can only be legal when made in pursuance of, in subordination to, and under the authority of the Constitution; but that this treaty was opposite and thorty of the Constitution.

5. That in the 7th and 8th articles of the amendments to the Constitution, the citizens are secured in all cases the trial by jury, except for naval and military offenses by sea and land, in time of actual war, "*flagrante bello*," (during the rage of war); and that no treaty could contravene these articles of the Constitution; that the trial by jury is a sacred and unalienable right; as all the powers given by the Constitution for the privation of the cardinal natural rights of life and liberty, are only a conditional cession of those rights

to the care of society, under the advantage of a trial by a jury of fellow-citizens, as the mutual safeguard and security of such rights so deposited; and that the exception of courts of militia, and in the navy, during the rage of war, is an exception by the Constitution itself, on the necessity of the case, for the people's safety; and that such exception proves its full extent and operation.

6. That even if the treaty was legal, the present offense which the prisoner is in custody for, is not within the meaning and construction of the treaty; for the 27th article of the treaty relates to murder and forgery, committed within the jurisdiction of either Great Britain or the United States; that is, within the peculiar exclusive jurisdiction of either, where the offense is committed, and to which the jurisdiction of the one or the other, to which the party flies for refuge, or as an asylum, could not extend; that it relates, therefore, only to the respective territories of the contracting powers; but that the offense now before the Court was done *supra altum mare* (upon the high seas), where all nations have equal jurisdiction, and no defect of justice could arise from a want of jurisdiction here to extend to the offense; that it was against the law of nations, which style a pirate *hostis humani generis* (the enemy of mankind), and over whom all nations claim a criminal jurisdiction equally, and over whom the United States have a concurrent jurisdiction.

Vattel says, on the construction of treaties, that nothing shall be so construed as to make the treaty an absurdity; and it never can be supposed the learned civilians and casuists, who framed this treaty, would have been so absurd as to make our nation of the United States give up her dignity, independence and concurrent maritime jurisdiction, which she holds equally in the great society of nations, with the rest of the world, or that they were ignorant of her holding such jurisdiction; or that Great Britain and the United States, by their own compact, could hold such jurisdiction exclusively; that the ocean is nature's great common, where all nations hold a common interest and authority, as tenants in common.

7. That the prisoner is a native citizen of America, and

was arbitrarily pressed, contrary to his will, into the British service; and an attestation of his birth in Connecticut, under the seal of the city of New York, and the prisoner's own affidavit of his birth, and of his being pressed, were produced.

The notarial attestation appeared on its own face to be genuine, and of an age equal to its date; that by reference to New York its authenticity can be fixed, and by reference to the custom house there, the clearance and list of the crew of the vessel, and name of the prisoner, might be found, as stated in his affidavit; that all this would show his defense is not a false one; and that the signature, Jonathan Robbins, now made in open court to his affidavit, and the one made to the paper signed several years since, before the magistrate in New York, are the exact and indubitable signatures of one and the same hand. Also, that no man was to be presumed guilty of any transgression of the laws of his country, until he was legally charged and convicted thereof; that the laws and proclamations made to preserve our neutrality, and a late one to prevent our citizens going into foreign service, were very severe; that the insolent and daring conduct of Britain, in pressing our seamen and citizens, was an attack on the sovereignty of our nation, and notorious; and the presumption from these laws, and such conduct was, that the prisoner was pressed contrary to his will, and the *onus probandi* (burden of proof) to the contrary, lay therefore with the prosecution; that if he was so pressed, it was meritorious, by the laws of God and man, to regain his liberty even by the death of his oppressors, and to avenge the insulted dignity of a free people; that hence the right of killing in war is founded—Vat., lib. iii., ch. 8, sec. 139—and that the prisoner, instead of being punished, “deserved well of his country.”

*Quid enim, potior liberate?
Quid pejor quam servitute?*

He knew this motto was imprinted on the hearts of his countrymen; that their liberties, birthrights, and their country's honor and dignity were most sacred to them; that they would only part with them but with their lives; that ignominy and slavery were to them death; and, that they would

ever hold an American unworthy the name of such, who would not sacrifice any one who, under the impious authority of any nation, would dare attempt to enslave him, and rob him of his national privileges.

Colonel Moultrie commented on the laws passed by Great Britain in the beginning of her war with us, for carrying American subjects over to England to be tried, and as one of the oppressive evils we fought against, and drew a striking analogy. Further, he observed, that the office of President was an executive and ministerial office, and had no right to control this court; as appeared by the Secretary's letter in this case, advising the prisoner to be given up; that constitution and laws only, formed the true sovereignty of the nation, and the judicial was the proper guardian of it; and that the executive in fact, is but subordinate to the judicial, as he is bound to enforce its decrees.

That sending a citizen from the bosom of his country and friends, and for immolation, like a lamb to the altar, to gratify the ambition or policy of any foreign power or king, was a capital punishment—what could be greater? By what law of this land such a punishment, or any other, could be inflicted here, in time of peace, without a jury or a trial? A punishment by which a citizen was to be tried, instead of by a jury, by a court-martial.

He further submitted, that by the law of the Federal judiciary, the district court, before whom this was brought, had no jurisdiction for crimes on the high seas, when the punishment exceeded thirty stripes, six months' imprisonment, or one hundred dollars fine; that in this case, this court, like an inferior court, or magistrate, was only competent to commit and retain in custody for trial, by the circuit court, and had no jurisdiction as to the merits; that the circuit court only had the jurisdiction, and that this court undertaking after commitment, to liberate or give up the prisoner, was to intrude on and usurp the *jus dicere* of the superior court; at least to determine and decide on it, and, if it had any jurisdiction, to abolish it and oust it of it; that in doing so, it would be precipitate and illegal.

Colonel Moultrie said the affidavits brought against the prisoner, even in a common case, were not sufficient to exclude a prisoner from bail; and much less sufficient were they, where a man was to be punished by exile, by so capital a punishment, in the first instance without any trial; that they were vague, uncertain, and ascertained no specific charge against the prisoner; and, in short, amounted to nothing more than mere suspicion, and even that but weakly supported; and that, under such circumstances, no man's life or liberty can be safe under this construction of the treaty. That as to removing a person from one State to another, to be tried where he commits an offense, all this is but like moving from one county to another; for the culprit is still within the jurisdiction and protection of his country; but far different it is to remove him to a distant nation, out of the protection of his country, there to meet a summary trial by a court-martial, and in the end, perhaps, be hung from motives of policy, more than from the principles of justice.

Mr. Ward. The counsel for the prisoner had addressed the passions of the auditory, which was quite unnecessary in this place, where the citizens were always remarkable for humanity and tenderness to the accused. It was not necessary, at this time of day, to discuss the question of constitutionality—that had been long since settled, in the ratification of the treaty by the proper authorities. It should be remembered that the cessions contained in the 27th article, now objected to, were mutual to the two nations; if the treaty cedes a portion of the rights of American citizens to the British government, the same treaty cedes an equal portion of the rights of British subjects to the American government.

In answer to the argument, that a citizen could not legally suffer under an article of a treaty which contained the rights secured to him by the constitution, I contend that a treaty made by the powers pointed out for the purpose in the constitution, is co-ordinate with the constitution itself, and even paramount to it; and that the court could not make it a question, whether the treaty between the United States and Great Britain, counteracted the constitution or not; the only ques-

tion for the court to settle was, is the demand made for delivering up the prisoner conformable to the treaty? I have not a doubt but it was.

To prove that the crime charged against the prisoner was committed within the jurisdiction of the British government, every action done in a vessel on the high seas comes under the jurisdiction of the nation to which the vessel belongs. In support of this, take the case of a child that should be born in a British vessel on a foreign coast; this child would be considered as a British subject.

I insist that treaties are co-ordinate with, and paramount to the laws and constitution, and that the court has only to consider, whether the prisoner is, or is not, comprehended in the meaning of the 27th article of the treaty.

As answer to the arguments of the prisoner's counsel, that he should not only be given up, but be released from prison on his own bail, it would be inconsistent for the court to release a man without trial, after having sanctioned the charge on which he was confined, by suffering him to remain in prison a long time under their authority; and if the prisoner is really the American he pretends to be, he would have been able, before this time, to have made it appear more clearly.

THE JUDGMENT.

JUDGE BEE. The question on which I am now to give a decision is grounded on a *habeas corpus* to bring the prisoner before me; and on motion by counsel on behalf of the consul of his Britannic majesty, the officer authorized by treaty to make the requisition, that the prisoner, charged with murder committed within the jurisdiction of Great Britain, shall be delivered up to justice, in virtue of the 27th article of the treaty of amity and commerce between the United States and Great Britain, signed the 19th of November, 1794.

Objections have been made by counsel on behalf of the prisoner to this motion, on a variety of grounds; and this case has been very fully argued on both sides.

Two papers have been produced on behalf of the prisoner: one, a certificate from a notary public at New York, dated 20th of May, 1795, that Jonathan Robbins, a mariner, had that day deposed on oath before him, that he, the said Jonathan Robbins, was a citizen of the United States, and a native of Connecticut; the other is an affidavit of the prisoner, made in open court, that he is a native of Connecticut; and that about two years ago he was pressed from the brig Betsy of New York, on board the British frigate *Hermoine*, and was detained there against his will, until the vessel was captured by the crew, and carried into a Spanish port, and that he gave no assistanct.

The motion before me has been opposed on a variety of grounds. It is contended, that it is a question of magnitude whether a citizen of the United States shall be tried by a jury of his own country, or in a foreign one: that the 27th article of the treaty, on which this motion is founded, is contrary to the Constitution of the United States, and is therefore void; that the treaty can only relate to foreigners; that the fact in this case being committed on the high seas, the courts of the United States have competent jurisdiction; that a grand jury ought to make inquest, before a party shall be sent away for trial.

It was also contended that this would strike at the root of the liberties of the people; that the Constitution secured the right of trial by jury to the citizens; and that treaties and laws altering that, were of subordinate authority; and of course void; that the treaty-making power may be abused; and it could never give authority to seize a person and send him away for trial.

It was also contended, that this is not an offense within the contemplation of the treaty; the word jurisdiction, means territorial jurisdiction; and that the act must be confined to offenses committed within the territory of either; that the sending a person in confinement to be tried in a foreign country is a punishment not to be inflicted on a citizen; that the treaty is a head without a body, legs or arms; that the affidavits do

not come up to the point, and are not sufficient to prevent the party being entitled to bail.

These were the points on which the objections to this motion were argued. In the course of the arguments, warm and pathetic appeals to the passions were made on some of the old grounds of opposition to the treaty, which I endeavored to check, because, as this treaty has been ratified agreeably to the express provisions of the Constitution, and is therein declared to be the supreme law of the land, and I am religiously and solemnly bound by the oath I have taken to administer justice according to the Constitution and laws, it is not in my power, nor is it my inclination, ever to deviate therefrom.

If we attend to the Constitution, and the amendments which are now part of it, we shall find that all the provisions there made respecting criminal prosecutions, and trials for crimes by a jury, are expressly limited to crimes committed within a State or district of the United States. Indeed, reason and common sense point out that it should be so; for what control can the laws of one nation have over offenses committed in the territories of another? It must be remembered, also, that in the 27th article of the amendments, where it is provided that no person shall be held to answer for a capital offense, unless on a presentment by a grand jury, an exception is made to cases arising in the land or sea service, or even in the militia when in actual service, in time of war or public danger. This shows unequivocally, that trials by jury may be dispensed with, even for crimes committed within the United States; and those observations are at once an answer to all the arguments founded on the right to trials by jury, they being expressly limited to crimes committed within the United States, and even then with some exceptions.

The objections made to the treaty's being contrary to the Constitution, have been so often and so fully argued and refuted, that I was in hopes no time would have been occupied on that subject, more especially as that treaty has been recognized by the legislature of the United States and is now in full operation. It is remarkable, that in the midst of all the warmth against the treaty, at its first publication, the 27th article

was one of the few that was never excepted to; and I believe this is the first instance in which it has been held up as dangerous to liberty.

The crime of murder is justly reprobated in all countries; and in commercial ones the crime of forgery is so dangerous to trade and commerce, that provision has been made in various treaties for delivering up fugitives from justice for these offenses; and many instances may be produced of criminals sent back to be tried where the fact was perpetrated.

What says the 27th article of the treaty now under consideration? In the first place, it is founded on reciprocity; in the next, it is general to all persons who, being charged with murder or forgery, whether citizens, subjects or foreigners.

It is for the furtherance of justice, because the culprits would otherwise escape punishment; no prosecution would lie against them in a foreign country; and if it did, it would be difficult to procure evidence to convict or acquit.

This clause is founded on the same principle with that part of the Constitution which declares that the trial for a crime shall be held in the State where it shall be committed; and the act of Congress to prevent fugitives from justice escaping punishment, declares that they shall be delivered up when demanded, to be tried where they committed the offense, either on a bill found, or an affidavit charging them with the offense.

The principle, then, being the same, and the one being expressly founded on the Constitution and laws of the United States, no solid objection can lie against this clause of the treaty. Nor does it make any difference, whether the offense is committed by a citizen, or another person. This will obviate the objection made by the counsel on that head. And I cannot but take this occasion to observe that the two papers produced by the prisoner are only affidavits of his own, or a certificate founded on an affidavit, which are not evidence; and if they were, prove little or nothing. It is somewhat remarkable, that a man of the name of Jonathan Robbins, with the paper produced in his possession, should continue on board a British frigate for a length of time, under another

name, and acting as a warrant officer, which impressed men are not likely to be entrusted with, and that he should afterwards take the name of Nathan Robbins, and lay in jail here five or six months, without the circumstance being made known until now.

All the arguments against delivering up the prisoner seem to imply that he was to be punished without a trial; the contrary of which is the fact; we know that no man can be punished by the laws of Great Britain without a trial. If he is innocent, he will be acquitted; if otherwise, he must suffer. This would be the case here, under similar circumstances.

The objection most relied on against this motion is to the word jurisdiction, in the 27th article of the treaty, and that the crime being committed on the high seas, the courts of the United States have a concurrent jurisdiction. There is no doubt that the circuit courts of the United States have a concurrent jurisdiction, and this arises under the general law of nations; and if the 27th clause of the treaty in question had not expressly declared the right to demand, and the obligation to deliver over, the prisoner must have been tried here.

With respect to the meaning of the word jurisdiction, I think the case quoted from Vattel, Book 1, c. 19, sec. 216, is conclusive, and this is corroborated by Rutherford, Book 2, c. 9, as to the jurisdiction over the men on board the vessels; and the clause itself seems to have contemplated this, because the word jurisdiction is used distinctly from countries in the next line; and this shows that territorial jurisdiction, as contended for, cannot apply to the present case.

When application was first made, I thought this a matter for the executive interference, because the act of Congress respecting fugitives from justice, from one State to another, refers it altogether to the executive of the States; but as the law and the treaty are silent upon the subject, recurrence must be had to the general powers vested in the judiciary by law and the Constitution, the 3rd article of which declares the judicial power shall extend to treaties, by express words.

The judiciary have in two instances in this State, where no provisions were expressly stipulated, granted injunctions to

suspend the sale of prizes under existing treaties. If it were otherwise, there would be a failure of justice.

I have carefully reviewed the arguments advanced by the counsel for the prisoner. I have looked into the Constitution, the treaty, the laws, and the cases quoted; and upon a full investigation of them all, I am of opinion, that from the affidavits filed with the clerk of the court, there is sufficient evidence of criminality to justify the apprehension and commitment of the prisoner for trial, for murder committed on board a ship of war belonging to his Britannic majesty, on the high seas; that a requisition having been made by the British consul, the officer authorized to make the same, in virtue of the 27th article of the treaty of amity and commerce between the United States and Great Britain, I am bound by the express words of that clause of the treaty, to deliver him up to justice. And I do therefore order and command the marshal, in whose custody the prisoner now is, to deliver the body of the said Nathan Robbins, alias Thomas Nash, to the British consul, or such person or persons as he shall appoint to receive him.

The court was immediately adjourned; the irons were replaced on the prisoner, and he was delivered over by the constables, to a detachment of federal troops, who had before been placed under arms opposite the court house, and had continued there during the sitting of the court. The troops immediately delivered up the prisoner to Lieut. Jump, of his Britannic majesty's sloop *Sprightly*, then lying in this harbor, and which sailed with the prisoner a few days after for Jamaica. From there he was taken to England, tried by court martial and hanged.

**THE TRIAL OF THE ACTION OF WILLIAM
WILBAR AGAINST B. W. WILLIAMS AND
OTHERS FOR LIBEL, NEW BEDFORD,
MASSACHUSETTS, 1845.**

THE NARRATIVE.

William Wilbar kept a store in Taunton, Massachusetts, in which he sold groceries and liquors. One Williams published in the same town a periodical called the *Dew Drop*, which he called a temperance paper, and there one day appeared in its columns a rather intemperate article written by him in which Mr. Wilbar and his business were very roughly treated. The writer described a dream in which he had seen the interior of the Wilbar store. All around the shop were casks, barrels and demijohns labeled "Man-killer," "Soul-destroyer," "Orphan-maker" and the like, and on the wall he read the signs, "Men trained here for the gallows," "Lessons given in suicide," "Children instructed in the road to death." On a high seat at the back of the room sat the Devil himself, flames of fire issuing from his mouth which scorched and withered the deluded customers who had been enticed therein. Other customers flocked in, some cursing and swearing, others quarreling and fighting. At last a youth stepped up to the counter and called for a glass of Lucifer's Elixir, drank it to the bottom and fell dead. Then the Devil's laugh and the shrieks of the men and women awoke the dreamer.

The storekeeper sued the editor and the printers of the *Dew Drop* for libel, but on the trial a great anti-liquor advocate and orator—who was to be best known to posterity as the husband of a celebrated wife¹—appeared for the defense and rather easily induced the jury to return a verdict of not guilty.

¹ STANTON, ELIZABETH CADY. (1815-1902.) Born, Johnstown, N. Y. Chiefly through her efforts the first Woman's Rights convention was held at Seneca Falls, N. Y., in 1848. For over half a century she worked incessantly for an amendment to the United States Constitution giving to women the right to vote. She died in New York City.

THE TRIAL.²

In the Supreme Judicial Court of Massachusetts, New Bedford, November, 1845.

HON SAMUEL HUBBARD,³ Judge.

November 13.

This is an action for libel, damages placed at \$30,000. The defendants are *B. W. Williams*, the editor and publisher, and Messrs. *Hack and Bradbury*, the printers of a newspaper published at Taunton, Massachusetts and called the *Dew Drop*. The plaintiff, *William Wilbar*, alleges in his declaration that he is a respectable grocer who had acquired a good reputation where he lived and that the defendants in an article published in the *Dew Drop* had grossly, falsely and maliciously slandered him to his damage, etc., etc. The defendants plead *not guilty*.

Timothy G. Coffin,⁴ and *A. Bassett*,⁵ for the plaintiff.

*Henry B. Stanton*⁶ and *T. D. Eliot*,⁷ for the defendants.

² *Bibliography.* "Report of the Trial of B. W. Williams and Others, Editor and Printers of the Dew Drop, a Temperance Paper Published at Taunton, Mass., for an Alleged Libel upon William Wilbar, a rumrunner of Taunton, before the Supreme Judicial Court at New Bedford, at the November Term, 1845; His Honor, Judge Hubbard, on the Bench. Taunton, Mass., Hack & King, Printers, Dew Drop Office. 1846."

³ HUBBARD, SAMUEL. (1785-1847.) Born, Boston; graduated, Yale, 1802, A. M. 1805; studied law and practiced in Biddleford, Me., 1804-1810, then in Boston in partnership with Judge Jackson; member Mass. Gen. Court, 1816-1818, 1820, 1821, 1831, and of the State Senate, 1823, 1824 and 1848. Member of Convention for revising State Constitution, 1820. LL. D. Yale, 1827; Harvard, 1842. Took an active part in religious and educational affairs. Judge Massachusetts Supreme Court, 1842-1847.

⁴ COFFIN, TIMOTHY GARDNER. (1788-1854.) Born, Nantucket, Mass. In early years engaged in seafaring life, later turned his attention to the law. Graduated Brown, 1813; admitted to Bristol bar, 1816. Judge Advocate Mass. Militia. As a *nisi prius* lawyer he had few equals. Died in New Bedford, Mass. See Brown Univ. Hist. Cat., 1764-1914. Drake Dict. Amer. Biog.

⁵ BASSETT, ANSELM. (1784-1863.) Graduated Brown, 1803; taught school, Rochester, Mass.; admitted to bar, 1808; practiced law, Narraguages, Me., 1808; Columbus, Me., 1809-1811; Roches-

Mr. Bassett in opening the case read to the jury the alleged libel which was published in the *Dew Drop* in January, 1845, and is as follows:

A DREAM.

"Was It All a Dream?"

As we sat in our room a few days since, thinking what more could be done to advance the cause of temperance in this community, we fell asleep and dreamed the following dream: We were in Rum Hollow, and by some irresistible impulse we were drawn into that house of human slaughter, kept by one WILBAR. Such sights as we there saw, may we never behold again. As we passed the threshold, the first object that attracted our attention was the presiding genius of the place—the *incarnate Devil*. On an elevated seat in the back part of this indescribable hell, he sat; while ever and

ter, Mass., 1812; Westport, Mass., 1812-1832; Taunton, Mass., 1832-1863. Member Mass. Legislature, 1831. Register of Probate, Bristol Co., 1832-1851. See Brown Univ. Hist. Cat., 1764-1914; Emery, S. H., Hist. of Taunton, Mass.

* STANTON, HENRY BREWSTER. (1805-1887.) Born, New London, Conn. Journalist and anti-slavery orator. His ancestor, Thomas, came from England in 1635 and was Crown Interpreter of the Indian dialects and afterwards Judge of the New London County Court. In 1826, went to Rochester, N. Y., to take a position on Thurlow Weed's paper, the *Telegraph*; deputy clerk Monroe Co., N. Y., 1829-1831; student Lane Theological Seminary, Cincinnati, O., 1832-1834, and left there to take an active part in the anti-slavery movement. Made speeches in Great Britain and the United States for thirty years and was repeatedly mobbed. From 1837 to 1840 he was prominent in the movement to form the abolitionists into a political party and was editor for a time of the *Massachusetts Abolitionist*. In 1840 he married Elizabeth Cady, a noted female reformer. Was secretary of the World's Anti-Slavery Convention held in London. Admitted to bar 1842, and practiced in Boston until 1847, when he removed to Seneca Falls, N. Y. Member New York Senate, 1849-1852; a Free Soil Democrat and one of the founders of the Republican party. Contributor to *New York Tribune* and *Sun*, 1860-1868; editor *Sun*, 1868-1886; author "Sketches of Reforms and Reformers in Great Britain and Ireland" (1849), "Random Recollections" (1886).

† ELIOT, THOMAS DAWES. (1808-1870.) Born, Boston, Mass. Graduated Columbian College, D. C., 1825; A. M. 1831, and began practice in New Bedford. Became celebrated in the litigation concerning the title to Quaker meeting houses in Massachusetts and Rhode Island; member Mass. House and Senate and member of Congress, 1854-1855, 1859-1869. Biog. Congr. direct., 1774-1911; Ellis (Leonard Bolles.), Hist. of New Bedford, 1892; Columbian Univ. Hist. Cat., 1821-91.

anon there issued from his mouth flames of fire, which withered and scorched all the deluded wretches who had been enticed within, by the intrigue and cunning of his faithful understrappers. Unobserved by the Devil's agent, whom we immediately recognized as Wilbar, we concealed ourself behind a huge cask labelled *Mania a potu*.

Having recovered somewhat from the shock on entering this den of the Devil, and from the effects of the pestiferous air which filled the place, we took a survey of the premises. Around the store were arranged casks, barrels and demijohns, some of which were labeled as follows: MAN-KILLER, MANIAC BEVERAGE, ORPHAN-MAKER, SOUL-DESTROYER, THE DEVIL'S SYRUP, DRUNKARD'S COUGH AND DELIRIUM TREMENS, ETC., ETC. We noticed also several signs nailed to the wall, a few of which bore the following inscriptions: MEN TRAINED HERE FOR THE GALLOWES, LESSONS GIVEN IN SUICIDE, CHILDREN INSTRUCTED IN THE ROAD TO DEATH. Directly over the place where Wilbar stood were suspended a skull and cross-bones. On the shelves above the casks and barrels were placed bottles, and we saw a creature which resembled the Devil in miniature, occasionally thrusting his head from the necks this we supposed to be the "Bottle Imp."

Near the Devil was a caldron of flaming liquid, which we afterwards discovered was filled from the Devil's own mouth, boiled down, bottled and labeled LUCIFER'S ELIXIR. We had thus far surveyed the place, when the door opened at our side, and a young, blustering man, with a red face and bloodshot eyes, stepped up to a cask labeled THE DEVIL'S SYRUP, and with an oath swallowed the entire glass. We easily recognized this man by his swaggering gait and horrible profanity. We have often seen him engaged about the store, serving at times as an under clerk. Another immediately entered and called for a glass of SOUL-DESTROYER. He drank and took his seat by the stove. A moment after, the door was again opened, and a miserable wretch staggered in, his hair was matted together, his eyes horribly swollen, his clothes torn and ragged, the very picture of despair. With a desperate effort he reached the counter and called for a glass of MANIA A POTU. An old man with spectacles approached towards the cask behind which we were concealed, and drew from it a glass. We held our breath until he left, for we discovered him to be the very man who once stood up in court and testified he had never sold in this store a *single drop* of MANIA A POTU. He administered the dose to his victim, who immediately became a raving maniac.

Customers now flocked in, some cursing and swearing, others quarreling and fighting. Among the number was a young man who stepped up to the counter and called for a glass of LUCIFER'S ELIXIR. At this moment a fiendish chuckle was heard, and Wilbar looking towards the Devil, clapped his thumb upon his nose, and with a significant look which was answered by his Majesty, proceeded to pour out the burning liquid. The young man drank to the very bottom of the glass, and with a horrid yell fell down dead upon the floor. His pockets were immediately rifled of their contents, and

lest life should not be entirely extinct, another glass was poured down his throat.

A rustling was now heard upon one of the shelves, and one of the Bottle Imps was heard to say, "*The Dew Drop Man*," whereupon the dead body was left, and all hands rushed to the door, having armed themselves with rotten eggs and rotten apples, doing, as we afterwards learned, but little harm.

The hellish laugh of the Devil, the screeching of the Bottle Imps, the hissing of the caldron, and the gibberish of the customers interrupted us in our dream, and we awoke. "WAS IT ALL A DREAM?"

THE WITNESSES FOR THE PROSECUTION.

Simeon Dean. Worked at Hack & Bradbury's printing office on 29th January last. The Dew Drop was published by B. W. Williams. Hack & Bradbury were the printers—office over Cooper's store. B. W. Williams was editor and publisher. Don't know about the paper being circulated anywhere. Mr. Williams took them out of the office. Don't know whether there were any papers of the number with the Dream in it sold out of the office. Hack & Bradbury didn't sell any. Hall's boy has taken papers out of the office, but don't remember that he took any of this number. The Extra Dew Drop was printed a short time after 29th January. Mr. Williams took all those extras away. None sold by Hack & Bradbury. Have been in the employ of Hack & King until last night. Was in the employ of Hack & Bradbury as long as they were together. Don't recollect that Hack & Bradbury ever sold any Dew Drops.

Cross-examined. Hack & Bradbury printed another paper called the Beacon of Liberty. They print books and pamphlets. It is a printing establishment.

Benj. F. Haskins. Worked for Hack & Bradbury last January;

they were printers. The Dew Drop was printed at this office. Work now for Hack & King. Mr. Williams took them away when they were printed. He takes them himself with the knowledge of the printers. Never carried any out myself. A part of them are printed the night before the publication day. They were published once a fortnight last January—now once a week. The advertisements are handed to Mr. Williams, and he hands them to the printers. The Extra Dew Drop was printed at Hack & Bradbury's. Mr. Williams took the extras. He took them all. Mr. Williams gave the order to strike them off.

James P. Ellis. Took the Dew drop last January; presume it was left at the door of the office where I stay. Don't know who left the number of 29th January. Pay Mr. Williams for the Dew Drop every year. Mr. Williams called upon me to subscribe for it when it first started. Don't remember whether I had the extra. It is printed at the corner of Weir and Main streets. I read the Dream. It struck me at the time that it meant Wilbar. Read the article the same morning it was published. Taking it altogether, thought it meant W. Wil-

bar, without reference to any particular point. Know nothing about the old man with spectacles, keeping at this shop, except by common report. Have often heard of the old man with spectacles. Don't know that the old man with spectacles kept at Wilbar's store at that time. Heard that he did before and since. Don't know that this old man has been in court as a witness against this store. Have not heard either of the defendants say anything about this dream meaning Wilbar.

Cross-examined. Have lived in Taunton 25 years. Have known Rum Hollow ever since I have lived there. Have known Wilbar two or three years. Simeon Wilbar keeps a shop, a cellar, in Rum Hollow. William Wilbar was said to be the largest dealer in Rum Hollow, and that was the principal reason I thought the Dream referred to him. Have seen the interior of W. Wilbar's shop. It was full of people, some young, and some pretty old; this was generally in the daytime. Have seen out in front drunkards there, more or less. The correctness of the picture in the Dream, and the things I had heard, led me to suppose that it meant the plaintiff.

Mr. Elliott asked the witness what he understood by Man-Killer, Maniac Beverage, etc., which are used in the Dream.

Mr. Coffin objected.

Mr. Eliot said that he wanted to prove that the witness understood by those terms, and how the community understood them.

The COURT admitted the evidence.

Mr. Ellis. I understand the terms to be used in a figurative sense, not literally.

Mr. Coffin said that the editor actually meant to say that the Devil was in the store.

Mr. Ellis. I should think the first part of the Dream was a good figurative description of a dramshop.

Mr. Eliot. Around the shop were arranged casks, barrels, demijohns, some of which were labeled as follows: Soul-Destroyer, Orphan Maker, Drunkard's Cough, etc. Does this language, as you understand it, describe the shop and articles for sale? It does.

Mr. Eliot. Near the Devil was a cauldron of flaming liquid, which we afterwards discovered was filled from the Devil's own mouth, boiled down, bottled, and labeled Lucifer's Elixir. Did you understand this to be a figurative expression? I did. Another immediately entered and called for a glass of *mania a potu*. Did you understand this to mean figuratively? I did. Is this language a just representation of those who frequent low tippling shops? It is. Young men falling down dead upon the floor. Did you understand this in the same way? I did. I understood all the Dream to be an allegorical description of all tippling shops, and of this shop in particular, if it is a tippling shop.

Mr. Eliot. In regard to rifling money—if you saw this article in another paper, not knowing the parties, should you think the money was actually stolen? I should not. If you should take up this paper in New Jersey, not knowing the parties, what should you think of it, taking the whole piece together? I am not prepared to say what I should think of it.

Benj. F. Haskins. (A num-

ber of Dew Drops, of different dates, containing remarks of the editor upon the libel case, were shown to the witness.)

Mr. Coffin. By whom were these papers printed? By Hack & King.

William Newcomb. I reside in Taunton. Don't know how far Rum Hollow extends. There is a place so called in Taunton. Have been in Wilbar's shop. Have read the Dream. Suspected it referred to Wm. Wilbar's shop when I read it. Thought it meant his shop because it described the old man with spectacles. Have seen an old man with spectacles in Wm. Wilbar's shop. Thought the Dream referred to Wm. Wilbar's shop, because there were more casks there than in any other shop in that quarter. He kept groceries, such as sugar, tea, coffee, corn, pork, rice, etc.—some herrings also. Have no doubt in my mind who was intended by this Dream.

Cross-examined. Have been in there two or three times per week. Wilbar does not keep that shop now. Think he left last spring. I saw casks in his shop, and I supposed there was liquor in them. Have been in Simeon Wilbar's store. Have not seen any casks in Simeon Wilbar's place. Simeon Wilbar's shop is under the same roof with William Wilbar's—a cellar. There is no communication between the two shops. Have bought liquor at William Wilbar's shop within a year. My business has carried me more to William Wilbar's than to Simeon Wilbar's shop. Have no doubt I bought liquor at William Wilbar's shop prior to Jan. 29. Have drank there. Liquor was sold in Simeon Wilbar's shop—kept in decanters

back of the bar. It has been said William Wilbar sold the most liquor. Have seen a good many casks in the back part of the shop of William Wilbar, and so many that it was difficult sometimes to get around them. Have seen other people drinking there. Don't recollect of seeing the old man with spectacles in Simeon Wilbar's shop waiting upon customers. Don't recollect of hearing cursing and swearing in William Wilbar's shop—not heard much noise there. Don't know but I might have seen men worse for liquor there. Don't know as I have seen men down drunk there.

Pardon Leonard, Jr. Reside in Taunton. Never read the Dream, nor heard it read. Am a constable. Have been in William Wilbar's shop and also in Simeon Wilbar's, but not so frequently in the latter as in the former. William Wilbar's shop was called a rum shop in the Hollow. Have seen folks drink there. Good many casks there—all kinds of casks and decanters. Have seen the room pretty well filled with customers. No doubt about seeing a good many drunk there. Have been in the back of his shop. There is a door from the shop to the barn. Never saw any gambling there. William Wilbar keeps most all kinds of provisions.

Leonard Crossman. Own the building formerly occupied by William Wilbar. I read the Dream. The Dream referred, I think, to William Wilbar. I thought it referred to him on account of the description of the casks, etc.

Cross-examined. Don't remember of seeing labels on the casks. I let the barn to William Wil-

bar. He hired the whole building—paid from \$300 to \$400 for it.

John Reed. Heard the Dream read in the house at the time of it. Expected it meant William Wilbar's store. Hack & Bradbury printed the Dew Drop before Hack & King. Don't know as I bought the Dream of Hack & Bradbury. I don't know when the Dream was bought. It was read in Mr. Lane's tavern. There was a bar kept there. William Wilbar kept shop in what is called Rum Hollow. The Cohannet Bank is not in Rum Hollow, but just this side. Can't state the date when I bought the Dew Drop of Hack & Bradbury—along through the winter some time. They sold them for two cents apiece. Didn't generally buy them of Hack & Bradbury when I could see one in the house.

Noble Briggs. Have resided in Taunton for over three years

past. Saw the Dream, and bought it of the boy, Simeon Dean, in Hack & Bradbury's office. Hack & Bradbury were not in the office. Tried to get it of some one else; would have given a number of dollars rather than not have it. Carried it home to my wife.

Roswell Whittemore. Am the person referred to as the old man in spectacles. I bought the Dream in the office, but can't say of whom. Bought it of a sandy-haired man. Called for a paper that had got the Dream in. I gave the paper to William Wilbar. Believe it is in being now.

Mr. Coffin introduced a *Dew Drop* of February 26, containing an article in relation to the prosecution of Wilbar. He read extracts from it, which he supposed would tend to aggravate the case.

Mr. Eliot read the whole article, to show the motive in writing the Dream and all other articles of a similar character.

THE DEFENSE.

Mr. Eliot. Gentlemen of the jury: I do not propose to detain you with a long speech. This is a new case in this county to me, and I have no doubt it is to you. We have never heard of a man coming to a court of justice and asking protection for himself as a violator of law. Thus far it is a novel one. Wilbar, a rum seller of the very worst description, asking a court of justice to protect him in his business. One of the defendants is editor and publisher of the *Dew Drop*; the other two are printers. Supposing this Dream to be a libel, there is no evidence to show that Hack & Bradbury circulated one of them. It must be shown that they sold them at that time, or at any subsequent time. There is no evidence that any of the papers were sold with their consent. Mr. Williams took the papers. He is the publisher, and admits it.

He publishes it for good and justifiable ends, and so long as it is published legally, it is a worthy publication. Papers of this description have done great good. The Dew Drop is promoting a great and good cause. Mr. Williams in conducting it has helped to carry on this cause. He has assisted to clothe the naked, to feed the hungry, to restore the parent, and to raise the fallen, and he deserves your thanks and mine, and will, I have no doubt, receive them.

If Wilbar's business had been legal, it would not have done to attack it rudely. If the plaintiff had a right to sell, the defendants had no right to bring reproach upon his business. Wilbar is a rum seller. He does not come here with clean hands. He does not maintain that place in the community which entitles him to redress. He stands upon very different ground from what he would if he was in a legal business. We expect to prove that William Wilbar kept a hell in Rum Hollow. We shall describe the character of this store, by men whom you will believe. William Wilbar is the greatest rum seller of this hole.

Gentlemen, all the authorities show that an action cannot be maintained for anything written against a party engaged in an illegal transaction. We don't mean to say that the Dream was literally true. We mean to contend that there were casks there which contained that which produced delirium tremens. We don't mean to say that he killed men, but that he sold that which killed. To prove this, is somewhat of a matter of fact. We shall introduce evidence to prove this beyond a doubt. This is a figurative description of a dramshop, and we shall satisfy you on this point. "Men trained here for the gallows." We shall show that Mr. Wilbar's business tends to train up men for the gallows. "Children instructed in the road to death." We shall show that the rum trade tends to this, and that children are, in Wilbar's shop, by trading with him, learning the road to death. We shall show you that the plaintiff has sustained no legitimate damage. We shall show you that Mr. Williams has been conducting a temperance paper—that he has no ill will against William or Simeon Wilbar. He wanted to do all he could to

“rout Rum Hollow,” and we hope and expect you will sustain him in it. The statements in the Dream are fairly figurative, or representative of a shop where liquor is sold.

THE TESTIMONY FOR THE DEFENSE.

Samuel L. Crocker (sworn).

Mr. Bassett. Are you interested in this suit.

Mr. Crocker. I feel no more interest in it than all good citizens should feel in a case of this kind.

Mr. Bassett. Have you offered to pay any money towards defraying the expenses of the defendants? Feel very sure that I have made no such agreement, but would have done so, if I had been asked.

Mr. Crocker. Am a resident of Taunton—have lived there for the last 20 years. My house is within sight of Rum Hollow. Wilbar occupied a shop in Rum Hollow in January, 1845. On the side of the door, outside, was a sign, with the words, Rum, Brandy, Gin, etc., painted upon it. I saw every day of my life men whom I knew to be drinkers going in and coming out. I often saw it in the morning, early, lighted up, and drunkards hurrying to it. I have seen drunkards passing in and out at all hours of the day—have seen loads of rum going into the store. There is a screen just inside of the door. When I saw the Dream, it brought to my mind a circumstance connected with this shop. I went into Wilbar's store with an officer in order to lessen the amount of intemperance during this week, which was court week. Was at first insulted, but was soon, however, well treated. Some of the customers thought this was the correct

course, viz., to put a stop to the use of liquor, and to prosecute the drunkards. Saw persons drinking, and others who were about to drink. Saw a woman with a tin pail in her hand, and saw some one in the store draw something and put into the pail. Saw casks, barrels and decanters there. Persons were in there who appeared to be intoxicated. Have seen drunkards pitched or pushed out of the store. This is a very common occurrence. Great deal of noise there, generally in the evening, and often during the day, when there is an unusual collection of people in town. Remained in the store 15 or 20 minutes. Saw hogsheads of rum, barrels and standing casks in the store. Did not see any groceries sold. Went behind the screen.

Cross-examined. Saw the sign on the outside years ago. Am sure that the time I was in Wilbar's store was in September before the Dream was published. The pitching out of the shop is of common occurrence. Could not specify any particular day.

James W. Earl. Knew where William Wilbar kept before February, 1845; live within 100 feet of his store. Have seen a good deal of drunkenness and heard a good deal of noise about the premises; have often looked into the store. Have seen a great many there, in all the different stages of intemperance. Heard cursing and swearing at night. Seen persons coming out in a fighting condition, and have

knock down in front of the store. Those persons who frequent this store are about as mean a class as can be conveniently found anywhere; have seen persons coming out drunk; an every-day occurrence; have rendered assistance to men who were down drunk about the door of Wilbar's shop. Have helped to get them a shelter and have taken care of them. Have seen casks going in and out, also bottles, jugs, rundlets, kettles and coffee-pots. Have seen persons going in and out at the side door on Sunday. Have also seen them intoxicated about the building; have been out near the door when they were about shutting up for the night. Seen some of the customers drunk, and some so as to go. Have seen them fall out. Have been waked up at night by noise. Went out and saw fighting round the door of Wilbur's shop. Shop sometimes open and sometimes shut at such times; know persons who make it a point to hang about there; know John Kenny. He has been intemperate. Have seen John Kenny coming out drunk from Wilbar's store a few days before he died; in July, 1844. He was taken the night I saw him with delirium tremens. He was wild, raving mad, showed fight, wanted to hurt everybody. He said a caravan of lions, tigers, etc., was after him; have read the Dream.

Cross-examined. I live in the brick Bank building between Rum Hollow and my house; occupy the whole house. Have not been into Wilbar's shop for two or three years. There is a side-door to the building—south-west side. Have seen persons go in at the front door on Sunday. Have seen Field go in there. There is

an oyster cellar under the store. Sometime in the Spring of 1844 Wilbar commenced occupying this store. Have seen children of 9 years of age in this store. Was 6 or 8 feet from the door. Two Gregory boys were in there, one about 9, and one about 11 years of age. Kenny came from Wilbar's door when I saw him. Know the printers of the Dew Drop—Hack & Bradbury. Mr. Williams has let me have the Dew Drop from the office.

Asa Tisdale. Live in Taunton. Am acquainted with Wilbar's shop. Have purchased liquor in his store. Have paid for the liquor. Once I paid for three loco-foco matches, and had the liquor thrown in. With two exceptions, bought liquor altogether at Wilbar's shop. Have seen other persons there, some drinking and some smoking. Have seen them buy articles there. Have seen persons buy a pint, two quarts, and a gallon of rum there. Have seen from one to fifteen or twenty in the store at a time, of all ages from 17 and younger up to 60. Liquor was kept in bottles, decanters, barrels and hogheads. There were marks on the barrels, viz.: "W. W." "Gin," "Brandy." Wilbar was there tending. There was a sign on the door outside, "Rum, Gin, Brandy, Wines, Cordials." Have seen twenty hogheads at one time in the store. Have seen persons there at all times—some in for it. The principal business of Wilbar was selling liquor. Have seen children go in there with tin pails. The last time I bought anything there was in February. The last time I bought any liquor there was one year ago last October. Know Pardon Barton. Drank a great many times with him at Wilbar's.

He is dead. He was an intemperate man. He appeared as rational as anybody when not intoxicated. Never saw anyone fighting in Wilbar's.

Cross-examination. Bought liquor there about once a week. Bought no more liquor because I left off drinking. Didn't want any more.

Dr. Charles Jewett. Am a physician and surgeon by profession. My attention has been drawn particularly to the effects of spirituous liquors upon the human system. Have read the Dream. I took it to be an allegory; not a literal description of facts; but figurative. *Mr. Eliot.* What, in your judgment, as a physician, is the effect of spirituous liquors upon human life. (*Mr. Coffin* objected. This has no bearing upon the case. The effect of spirituous liquors is no justification for the defendants. The Court decided the question to be competent.)

Dr. Jewett. I believe, as a physician, the direct tendency of spirituous liquors is to destroy life. It affects the coats of the stomach, and through the medium of the nervous system, deranges all the functions of the body. Alcohol passes directly into the circulation, and, consequently, is distributed through the whole constitution. It is classed by the most eminent medical writers as a poison. It is, without doubt, one of the most accurate poisons. There are but one or two others that will destroy life quicker. There is no power in the human system to change the nature of alcohol. It remains the same wherever it is found in the system. It is absorbed but not digested. The breath of an habitual drinker

may be collected on the inside of a glass vessel, by a chemical process, and from its alcohol may be distilled. An effort was made some 15 or 20 years since to ascertain the number of drunkards who died annually in the United States. New Haven was taken as a fair sample. It was estimated that there were 30,000 drunkards in the United States who died in consequence of using intoxicating drinks. I believe this to have been below the mark. The use of alcohol is the cause of delirium tremens. There is no other cause. The subjects of delirium tremens are apparently mad, raving, under great fears; they suppose themselves to be pursued by demons and evil spirits, invisible to others, but visible to them. They commit suicide under the influence of this terrible disease. Have seen diseases terminate fatally where medicine would have apparently cured the patients if they had not been hard drinkers. Drunkards have a cough peculiar to them. Could recognize this cough without seeing the patient. It is the opinion of medical writers that the constitution of the child becomes tainted by the excesses of the parents. Have seen a great deal of figurative writing in connection with the temperance cause. Considered this Dream as allegorical. Intemperance is one of the most fruitful sources of insanity, and the hardest to cure.

Mr. Coffin. Were the English nation hard drinkers? They were. Were they long lived? I think not. The Germans were not as hard drinkers as the English, Scotch or Irish. The Scotch are the hardest drinkers. They consume immense quantities of spirits. Delirium tremens is

always produced by alcohol. Are these evil spirits? Can't tell positively. Delirium tremens is an illusion which the subject cannot divest himself of after he has recovered. Dr. Sewall is good authority.

Rev. J. Curtis. Have been a clergyman since October, 1825. Was chaplain at the Auburn Prison two and a half years, and at Charlestown Prison 17 years. Have directed my attention to intemperance as a source of crime. This is a duty I owe to the State. Have probably examined thousands at Auburn and Charlestown prisons with regard to their habits of intemperance. Tried to get the prisoners to be frank and tell their habits of life. More than three-quarters of all the prisoners in Charlestown of whom I have had personal knowledge, were intemperate men. There is nothing so destructive to the morals of men, as intemperance. All other causes combined, do not produce so much immorality as the use of intoxicating drinks. It destroys the kindlier feelings, and hardens the heart. Have read the Dream. A sister of a convict in prison sent him some papers and books, and among them was this Dream. Wishing to examine the papers to see if they were proper for the prisoner, I saw this Dream. I read it. Supposed it to be an allegory, and an exceedingly apt one. Think the use of intoxicating drinks injurious to the soul.

Cross-examination. Mr. Coffin. What is the soul? The intellect, the will and the affections. Did Noah get drunk? Yes. What is your opinion of Noah's happiness? I think he is in Heaven. His soul was not injured then? The soul might recover from the

injury received from the use of liquor, the same as the body may recover from its effects. What induced you to think the Dream an allegory? From the general character of the piece, and my knowledge of the rum business. Is the Book of Job an allegory?

The Court stated that the witness need not answer that question, unless he was willing to.

Mr. Curtis. I decline to answer. However humiliating it may be to me now, I was, when I first left college, a rum seller. I thought men who traded at my store were temperate, but I will relate two instances to the jury to prove the contrary. One man, a lawyer, who traded with me, acquired habits of intemperance by the use of liquor at my counter, and died a drunkard. Another man, who was a member of Congress, became confirmed in his habits of intemperance while trading with me, and died a drunkard. I feel humbled before God as I think of these facts. If the whole property of Massachusetts were given to me, I would not be a rum seller. I have no property which I acquired while in this business. Before I entered the ministry, my feelings and views were changed.

Mrs. Miranda J. Barton. My husband's name was Pardon B. Barton. He died 28th of October last. In the Insane Hospital at Worcester. Knew William Wilbar's place. I have seen my husband there frequently. He was intemperate; so much so that he took to it all the time. Have seen him there half a dozen times a day. Have seen him in there when he was the worse for liquor, and sometimes when he was sober. He went to the insane hos-

pital the middle of last May. He behaved very bad before he went. At one time he caught the axe and drove us all out of the house and threatened to kill us. He jumped out of bed. He was a moulder in the foundry. He said the devil was after him, and he had got to kill us. Was not with him when he died. He was carried from the workhouse in Somerset to the Hospital. Frequenting the rum shop made him a pauper. He was 35 years old. Had four children. He was, after he stopped drinking, very much against these rum sellers. He would curse all the rum sellers to the lowest notch.

Cross-examined. Lived down by the Baptist Meeting House, few steps from Wilbar's shop. Most always saw him standing in the store door. Never went into the store. He worked at the Weir Bridge. He was in Somerset a little over a month. He was confined to the house about three months. He had a sister in Somerset who was deranged. My husband was confined for insanity three years ago. He had two sisters who were insane. They were not intemperate. Mr. Barton did not take any ardent spirits in my house while he was sick. Was confined to the house a month or six weeks before he was carried to Somerset. Attended him constantly. When he was first taken, the disorder lay in his feet; it was a sort of inflammation. Dr. Gordon attended him.

George E. Shattuck. Reside in Taunton. Knew Mr. Wilbar's place of business. Have stopped repeatedly before the door. Have seen a great many drunk in and around the shop and door. Have heard cursing and swearing

there. These persons were generally very low, miserable persons, very intemperate. Have seen Mr. Wilbar there. Have seen sometimes twenty or thirty in there at a time. Court days, the Hollow is generally full. My business led me to pass by there often. Some persons near there bound shoes for me. Have passed by sometimes two or three times a day. These things I saw a great many times. Have been by there all times of day, and almost all times of night. Sometimes at 11 o'clock at night and sometimes before daylight in the morning. Shop was sometimes open in the night. Have frequently seen a great many hogsheads and barrels going in there. They smelt like rum.

Cross-examined. Am in the shoe business in Taunton. My store is east of Wilbar's. Couldn't see his shop from my store. Lived on the Green at that time. Was obliged to go through the Hollow often. Have been in the Hollow on High Court days. Went there to see the fun. Saw the people intoxicated on these days in the Hollow. It was not fun to me; it might have been to some people. Have seen a great many coming out of Wilbar's shop. More rum sold at this shop than at any other in the Hollow. Have seen men coming out drunk. Have seen persons coming out drunk at all times. Never went into the shop. Went as far as the step of the door. There is a screen just inside of the door. The screen is a little one side, so that I could look in. Have seen the store open after 9 o'clock a great many times. Have heard cursing and swearing there. Hear swearing generally when I pass by.

James Woodward. Am deputy sheriff in Taunton. Knew William Wilbar's place of business. It is a place where there are a great many in. Lower class and loafers generally go there. Have seen persons in there under the influence of liquor. They go in and drink. Sometimes there is considerable noise in there. Went into Wilbar's store once with Samuel L. Crocker. It was court week. There were several in there at the counter. They had something turned out ready to drink. They turned round. Saw casks and hogsheads of all sizes in there. Saw persons drawing something from them. Strong smell of liquor in the store. This is the largest establishment in the place. Have seen them unloading a great many casks there. Have seen people bringing out kegs from this store.

Cross-examined. Am often called down to this store on business, so often that I could not tell how many times I have been there.

George H. Babbitt. Reside in Taunton. Was constable for Taunton at the time Wilbar kept store. Was acquainted with Wilbar in his place of business. Was in there the latter part of November, one year ago this month. Had two warrants against Mr. Wilbar, and went to serve them. There were a number in there; some drinking and some standing round. Half a dozen or more in there. There was a screen just inside of the north door. Could see in the door at the side of the screen. The screen was to take off the prospect from the bar. Have passed there a number of times every week. Have seen people going in and coming out in all conditions, some drunk and

some sober. Didn't know any difference in the store between the months of November and February. Have known the store since the foundation was laid. Have frequently seen them loading and unloading goods, barrels, etc., at his store. Think they kept groceries there.

REBUTTING TESTIMONY.

Horatio W. Field. Have been in the store where Wilbar kept for the last ten years. Plaintiff entered into possession of the store in March, 1844. He occupied the first floor. Simeon Wilbar occupied the cellar and upper story. From the first of December up to the time William Wilbar left the store in April, there was no rum sold there. There is a door in the west side which lead to Simeon Wilbar's entry to go upstairs. No communication between Simeon and William Wilbar's store. In cold weather, the front door of William Wilbar's store is generally closed. William Wilbar would go in the morning (Sunday), sweep out the shop, lock it up, and go back. The usual time of shutting up the shop in winter time was 10 o'clock, but oftener nine and half past. Have never seen any fighting, or heard cursing and swearing in this store since April, 1844. Wilbar kept groceries and provisions to sell. Know Asa Tisdale. Between April, 1844, and April, 1845, have known Tisdale to buy all kinds of groceries which a family would need, such as butter, cheese, pork, flour, codfish. Mr. Wilbar and I have delivered them to him. Should think fifty dollars' worth of groceries were delivered to him while Wilbar kept there.

Cross-examined. Shall be 20 years old the 23rd of January next. Commenced to keep in this store when I was 12 or 13 years of age. Have been clerk there ever since. Wilbar is my uncle. There is a door that leads from Wilbar's store to Simeon Wilbar's barn. Can't say but what there was a large stock of liquors on hand from the 1st of December up to the first of April or not. Think very likely there was. It was sold of course; don't recollect that Wilbar sold any. Put the money that I took for this liquor into Wilbar's safe. Expect Mr. Field sold part of this liquor. It is a part of my business to sweep out the store. Wilbar swept out Sundays. Was in there so constantly that the door could not have been open without my knowing it, except once or twice, when I was out of town. I don't know what Wilbar did Sundays. Don't know who kept the books. Wilbar's shop was a remarkably quiet place. Presume there has been liquor sold in tin pails. It may have been that I gave Tisdale three loco-foco matches and liquor, but don't remember. Don't recollect having sold crackers and liquor.

Elias A. Morse. Am a deputy sheriff. Knew Pardon Barton for a dozen years. Went home

two years ago last April and found him in jail. Had to confine him in a room. Had him there fifteen days. He got much better before he went out, but was not quite recovered. On the 16th of May I arrested him. He was sent to the House of Correction as a man not furiously mad. Have known but very little about him since. Have been into Wilbar's store, but not to stop any. Passed it frequently, but not so often as some others. The north door is generally closed in cold weather.

Cross-examined. Have been into Wilbar's store, and have had to open the door to get in. Was in a few times when Wilbar occupied it. Don't know as I ever saw any disturbance there when Wilbar occupied it. Have frequently had warrants to serve on people in and about there. Went there to find them. Barton has had the reputation of being a very intemperate man. The door of Wilbar's store was partly glass. Don't know whether I could see through or not.

James Sproat. Pass by Wilbar's store a number of times a day as I go to my house. The door of the shop is like other doors—generally closed in cold weather.

MR. STANTON, FOR THE DEFENSE.

Mr. Stanton. Gentlemen of the jury: As was remarked to you by my learned associate in his opening address for the defendants, the cause you are impanelled to try, is of a novel character. Probably the precise questions which it presents for your decision have never before been submitted to a jury of this Commonwealth. Nor is this merely a novel case. It exhibits features more embarrassing than this. The

main questions here to be settled are intimately connected with one of the leading moral enterprises of our age—an enterprise which enlists the warmest feelings of large masses of men, and concerning which our fellow citizens entertain opinions as varied and contradictory as ever found a lodgment in the human mind. It would be too much to presume that you, gentlemen, have not adopted some of these opinions, and participated to some extent in this feeling. I pray you to be on your guard and let no sentiments of favor or aversion, towards either of the parties now at your bar, obtrude into this temple of justice and influence your decisions. Let this cause be decided on its true legal merits. I am especially solicitous that the temperance reform may be no further involved in this trial, than is necessarily connected with the proper interpretation and construction of the alleged libel set forth in the plaintiff's writ, and the nature of that defense which we set up for the alleged publication of that libel.

What, then, are the questions which it is your duty to decide? They are not, I apprehend, whether the temperance reform is wise in itself, or judiciously conducted—not whether total abstinence from intoxicating liquors is right or expedient—not whether men should sign the temperance pledge and organize temperance societies—not whether moral suasion alone, or combined with the judicious enforcement of wise laws, is best adapted to secure the great end which all benevolent men desire—not whether this *Dream* is written in good taste and temper, and is, upon the whole, a timely and apt publication—not whether the *Dew Drop* is a valuable auxiliary to the cause of sobriety and sound morals, and the labors of its editors a blessing to the community in which he dwells. No, gentlemen, these questions are not now submitted for your decision; and though I entertain long considered and firmly settled opinions in regard to each of them, I am not so far forgetful of my duty as to obtrude them upon your consideration.

The real questions for your determination are:

First. Did the defendants publish the *Dream*, set forth in the plaintiff's declaration?

Second. If so, did they publish it "of and concerning" the plaintiff?

Third. If so, is it a libel?

Fourth. If so, has this plaintiff any right to seek redress, for such publication, in a civil suit, in a court of justice?

Fifth. If so, have the defendants, during this trial, justified this publication? Have they proved it to be true, according to its fair interpretation?

Sixth. If they have failed in this last particular, then what compensation in damages, shall they render to the plaintiff on account of this publication?

I will examine these questions in their order; remarking in the outset, that the burden of making out his case rests upon the plaintiff. He is to convince you of our guilt beyond a reasonable doubt. It is not our duty to prove ourselves innocent.

First. Did each of the defendants publish this Dream? The law defines publishing thus: "The wilful and intentional delivery of a libel, by way of sale or otherwise, is a sufficient publication." Waiving all argument in regard to Williams, I submit to you that there is no proof of a publication by Hack & Bradbury. They were merely job printers, having no pecuniary interest in the Dew Drop, never selling it, but simply printing it in the way of their trade, after which the whole edition was regularly taken from their office by the editor. I ask you, then, to acquit Hack & Bradbury, whatever disposal you shall see fit to make of the remaining defendant.

Second. Was this Dream written and published of and concerning the plaintiff? On this point, you are to hold the plaintiff to strict proof. If the publication applies only to a class of persons, then the plaintiff cannot maintain his action, even though he be one of that class. He must convince you that he is the person specially alluded to. Now, I contend that this Dream is a vivid and faithful picture of any and every dramshop in the State. No one of Satan's emissaries, who does his master's bidding by ministering to the baser appetites of our nature, has the right to say, "I am the origi-

nal of this portraiture." Why, then, does William Wilbar claim a monopoly in this fancy sketch? Is his tippling shop pre-eminently "the house of human slaughter?" To this, it is replied, that the Dream speaks of "one Wilbar." But there are two Wilbars who keep dramshops in "Rum Hollow," in Taunton. And if it be doubtful to which the Dream applies, then this action must fail. Why, then, does the plaintiff say of himself, "Behold the man!" Is the picture so lifelike that there can be no mistake as to the original? Is it a true likeness?

Gentlemen, I am fully sensible of the load under which the defendants' case staggers at this precise point! The plaintiff's leading witness has testified that, on reading the Dream, he thought it referred to William Wilbar, because it was such a perfect description of his grogshop—so striking in its general outlines—so apt in its minute particulars! And methinks I hear the plaintiff now saying, "What, not mean me when you penned this Dream! Why, never did sunbeams more faithfully impress the living lineaments of the human countenance on the daguerreotype plate than this Dream portrays my house of human slaughter in Rum Hollow. Not mean me? Impossible!" Really, I fear we shall have to abandon this ground of our defense. For, all the witnesses represent the plaintiff's establishment as a real hellhole, a very Devil of a place; and so does the Dream. Gentlemen, we must yield this point. William Wilbar is the recruiting sergeant for perdition in Taunton—he is the crown prince of Rum Hollow—and I despair of convincing you that this Dream is not a faithful sketch of his administration in that realm.

Third. Is this publication libelous? To this I reply: Undoubtedly it is. It possesses every element of a libel—it meets every definition of a libel which the books furnish. It represents somebody as engaged in a most scandalous, infamous and diabolical avocation, and for the sordid purpose of pecuniary gain. If the plaintiff be the person intended, and the publication be false, then there is no amount of damages too great to be wrung from these defendants. There is not

one of you, gentlemen, that would have such a paper published of him for all the wealth of Potosi. But, if, on the other hand, the publication be true—if it be a faithful delineation of the plaintiff's vocation, then is there no depth of infamy too low for you to consign him to. Let your verdict place a whip in every honest hand, to lash him naked through the world.

Fourth. But suppose you shall find, that all the defendants published this Dream—that they wrote and published it of and concerning the plaintiff—and it is clearly libelous—an important question then arises, viz.: Does the plaintiff sustain such relations to the laws of this Commonwealth in regard to the subject matter of this Dream, as entitle him to come to those laws and ask for redress on account of this publication?

In discussing this branch of the case, I shall address myself mainly to the bench—for, the questions involved in it are chiefly legal questions. It will be for his Honor to instruct you what the law is on this point, and it will be your duty to apply the rules thus given you, to a few simple facts, about which, with perhaps one or two exceptions, there will be no dispute between me and the learned counsel for the plaintiff.

May it please your Honor, I deny the plaintiff's right to maintain this action, because: First, at the time of the alleged publication of this Dream, he was and had long previous thereto been engaged in the traffic in spirituous liquors, without being duly licensed therefor, according to the 47th chapter of the Revised Statutes; and therefore, in violation of law. Second, during the same period, he kept a tippling house and dramshop, in violation of the laws of this Commonwealth. Third, the publication was made of him solely in his vocation as such a trafficker, such a keeper, such a violator of the laws. Fourth, and from these facts (which are for the jury to determine, and which will hardly be disputed) the inference is drawn, both by principle and authority, that this plaintiff, being thus the violator of the law, cannot come to that same law for aid in obtaining damages for what is pub-

lished of him in regard to his agency in a business in which he thus transgresses the law—no matter how libelous the publication be, nor from what motives put forth.

I will first glance at those general principles on which this rule of law is founded.

As between the Deity and His subjects, human government is a divine institution. But, as between man and man, the ruler and the ruled, human government is, for all the purposes of this argument, a contract. Like other contracts, it has its consideration—its conditions precedent and subsequent—its things to be done and not to be done, by both the contracting parties. For instance, the Government confers benefits and imposes burdens on its subjects. The bearing of the burdens by the subject, is the condition precedent on which the Government confers the benefits upon him. The Government extends its protection to the citizen, and exacts obedience to its requirements from him. The one is a consideration for the other. The yielding of the obedience is the condition precedent on which the protection is extended. The Government wards off aggression upon the rights of the citizen, and imposes restraints upon his conduct towards itself and his fellow citizens. The submitting to the restraint, is the condition precedent on which the Government binds itself to ward off the aggression. All righteous Government among men is based on this reciprocal discharge of duties. Justly does human government, echoing the Divine, say to its subjects, "this do, and thou shalt live." The refusal to discharge these reciprocal duties brings retribution in its train. Does the Government fail to confer benefits, to extend protection, to repel aggression, upon its subjects? Laws violated with impunity, or open insurrection against its authority, or successful revolution, are the consequences sooner or later, as the history of Nations, written in blood, proves. The injustice of taxation without representation, the imposing of burdens without conferring corresponding benefits, was the cause and the justification of our own glorious revolution. On the other hand, does the citizen refuse to bear the burdens, to yield the obedience, to submit to the

restraints which the Government imposes, then fines, imprisonment, death itself, are the consequences.

Let me apply these principles to the case now on trial. And, in so doing, I am far from saying that in the application of these principles to all conceivable cases, there will be no need for modifications, for limitations, for exceptions, and especially for explanations. I apply them only as general principles to this particular case.

The plaintiff was living in the hourly violation of one of the conservative laws of this Commonwealth. In so doing, he was preying upon the vitals of society, sapping the foundations of morality, undermining the social edifice. If all his fellow-citizens should do as he was doing, we are a tribe of anarchists, a horde of barbarians, a nation of bandits. An editor libels him in this his vocation: holds it and him in respect to it, up to public detestation. For once in his life this contemner of the laws, this enemy of social order, enters the sanctuary of the law, not to repair the breaches he has made in its walls, not to offer himself a sacrifice on its altar for his crimes, not to do homage to the Deity which impartial justice has enthroned there; but to invoke the aid of the law in his behalf in regard to the very matter in which he has trampled upon the law and set it at defiance? What, I pray your Honor, has this law to give to the man who invokes its aid under such circumstances? It owes him nothing but punishment for his offenses. If he has been libelled, it is his own rebellious hand which has plucked down scorn and infamy on his own head. He is eating the fruit of his own doings. Let him be filled with his own devices. He has sown to the wind. Let him not shrink from reaping the whirlwind.

William Wilbar, in respect to the subject matter of the alleged libel, refuses to bear the burdens which the law imposes. Why should he enjoy its benefits? He scoffs at its requirement of obedience. Why should he be sheltered under its protecting wing? He breaks loose from all restraint upon his conduct in this regard—hurls ruin and death round the land—defies the penalty for his crimes. Why should the law,

which he thus despises and contemns, ward off aggressions upon him? Does he dare to come to a government of law, and ask it to aid him in obtaining damages for a libel published of him in respect to his agency in the sale of spirituous liquors? Why, the law, in this regard, is his worst enemy. It has long been waiting to get him within its reach, that it might scathe him with its retributions. How dare he pollute its sanctuary with his presence? Does he flee here for protection? His asylum shall be his grave. As plaintiff in this action, he is an outlaw. And yet he comes here, trampling at every step upon the provisions of the 47th chapter of our Revised Statutes, and has the brazen audacity to ask your Honor and this jury to put money in his purse because a law-abiding citizen has, in character of fire, blazoned abroad his law-despising, man-destroying, heaven-daring vocation. Let the Bench frown upon him. Let the jury-box flash its indignation around him. Let him be placed outside this temple of Justice which he defiles, and there, clad in sackcloth and ashes, do penance for his legal transgressions and his moral crimes.

Of course, your Honor does not understand me as insisting that Wilbar should have no protection from the law—that he should be subjected to assaults and robberies with impunity. He is a member of society, and however unworthy he may be, society owes it to itself that it protect him in these respects. But I speak of him as the plaintiff in a civil action for damages for a libel on him in regard to his agency in an unlawful pursuit. Surely, there can be no principle of law more sound or salutary, than that a party who pursues an illegal vocation shall not recover damages for a libel upon him in that vocation. The law will not permit him to take advantage of his own wrong, nor will it aid him in making money by his own transgressions. For him and his libeller, so long as the quarrel is confined to them, the law has nothing to give, and from them it has nothing to take. It lets them alone, and will aid neither one of two such wrongdoers. Undoubtedly a different rule obtains in criminal prosecutions for libel. There the Government has its

rights, and the mere illegality of the party's vocation will not, of itself, constitute a defense for a libel upon him in that vocation, though perhaps this fact might mitigate the punishment in case of conviction. Again: The rule for which I contend is also deducible from all the authorities.

There are many legal maxims and propositions of general application, which have their origin in those foundation principles of impartial justice, from which I deduce this rule. I mention a few of the most familiar, such as: "No man shall take advantage of his own wrong." "He who would have equity must do equity." "*Ex turpi contractu actio non oritur.*" "The law permits no man to stipulate for iniquity." So, the courts will not enforce contracts when founded on a consideration *contra bonos mores*. Nor will they aid the party, who has paid such a consideration, to recover it back, even though the other party refuse to fulfill the contract. Nor will they aid either one of two gamblers, or sustain a party who sues to recover a wager. In the language of Lord Mansfield, courts of justice will not so far forget their dignity as to stoop to aid either one of such parties. So the courts will not, in an action for assault, sustain the plaintiff who was the aggressor. In all such cases they dismiss the party with the consoling maxim, *damnum absque injuria*.

But we are not compelled to grope among the analogies of the law in search of authorities to support this rule. It is laid down explicitly in the books.

In 2 Starkie on Slander, 87 (Wendell's edition), it is said, the plaintiff cannot recover if the vocation in which he is libelled be an illegal one. In 3 Stephens' *Nisi Prius*, 2222, the rule is laid down thus: An action cannot be maintained for anything written against a party concerning his conduct in an illegal transaction. A leading case in support of this principle is *Hunt v. Bell*, 1 Bingham's Reports, 1. The question was elaborately argued, and the Court unanimously declares that a person who pursues an illegal vocation has no remedy by action for a libel regarding his conduct in such vocation. Another leading case (very similar

to that now on trial), where this rule is broadly laid down, is *Manning v. Clement*, 7 Bingham's R., 362. In *Tibbart v. Tipper*, 1 Campbell's Reports, 351, it is said by Garrow, that in an action for a libel upon an author, Lord Kenyon admitted evidence of the nature of the plaintiff's works; and it appearing that they were themselves of a libellous and scandalous description, his Lordship threw his parchment at his head, and dismissed him from the Court with infamy. Also the celebrated case of *Commonwealth v. Cheever* (as reported in the *N. Y. Evangelist*, July 4, 1835), where the Attorney General lays down the rule thus: "What the law allows as lawful, it protects the citizen in doing. And when the people, by the law, declare that no man shall make rum, then if the distiller is libeled, he has no cause of complaint." So the law bids these reformers to forbear to libel a citizen in a business protected and sanctioned by law.

And now, may it please your Honor, if I have succeeded in satisfying the Court, that a party who pursues an illegal vocation cannot maintain an action for a libel upon him in that vocation, we ask you to instruct the jury to find, whether this plaintiff was, at the time of the publication of the alleged libel, pursuing such a vocation, and whether the publication is of him in that vocation; and if they find these issues in the affirmative, then to acquit the defendants, however libellous the publication, and from whatever motives put forth.

Having now, gentlemen of the jury, finished this exclusively legal discussion, it remains to examine before you the two main facts on which that discussion proceeded, viz., that the plaintiff was engaged in the traffic in spirituous liquors, without a license, and in keeping a tippling-house; and that the *Dream* was published of him solely in that capacity.

These questions are for your determination, and if you find that the plaintiff was so engaged, and that the publication was of him in such vocation, then, should the Court charge you on the point of law I have just been discussing, according to my request, it will be your duty to acquit the

defendants without exploring further into the merits of this case.

Infer not from this that the defendants are seeking to escape through some technical flaw which ingenuity has found out for them. No! They are here to meet this case in all its aspects. On every point which it presents, they ask for no mercy and they will show no quarter. They defy the plaintiff and tell him he shall have ample satisfaction on every issue tendered. But he has dared to summon them into a court of law, and they will hold him to its most stringent rules and "cavil on the ninth part of a hair." They will teach him that as respects the issue he tenders to them at this bar, he has no rights here. They will brand him "outlaw!" The sanctuary where he has fled shall become the altar on which he is offered up. He has invoked Justice. Let him have it. It shall be to him a consuming fire. But that their triumph may be complete they will waive all objection to his forcible entry, never asking *quare clausum fregit*, and give him a *locus standi* in Court, and then, by proving the truth of the libel, will drive him in disgrace from your bar. Then,

"Lay on, Macduff;
And damn'd be he that first cries, Hold! Enough!"

To the point:

First. Did the plaintiff traffic in spirituous liquors without a license? Did he keep a tippling-house, in violation of law?

The fact that he was not licensed according to the provisions of the Revised Statutes is admitted.

I will not weary your patience by going over the great amount of evidence introduced to show that he trafficked in ardent spirits and kept a dramshop. Nor will I insult your understandings by seeming to doubt for one moment that every mind on your panel is fully made up on these points. As to the great extent and ruinous consequences of his traffic, and the atrocious character of his dramshop, I shall have something to say while examining another branch of our defense.

Second. Was this Dream written and published of the plaintiff, solely in his vocation as a dealer in spirituous liquors and the keeper of a tippling-house, in violation of law? Or, did the defendants in their publication travel out of the line of his business and attack him in other respects?

The discussion of this question so closely embraces another, that for our convenience I will examine them both at once. Then let us also inquire:

Third. Is this Dream, when subjected to a fair interpretation, true? Is it, when its real meaning is ascertained, a justifiable criticism upon the plaintiff's business.

Here is the very gist of this case. If we satisfy you that this publication is true, his Honor will instruct you that we are entitled to your verdict. It accords with the common sense of mankind as well as the law of the land, that in civil actions for libel the establishing of the truth of the libel, constitutes a complete defense to the action.

You are aware of the grounds on which we base this part of our defense. We have set forth on the record that this publication was made solely in regard to the traffic in spirituous liquors in tippling-houses and dramshops, that the plaintiff was engaged in such traffic, that the publication was not a literal description of scenes which had transpired, but an allegorical description of the nature and tendencies of such traffic, and of the effects of the excessive use of such liquors, that the terms and epithets employed in this publication were not literal descriptions of the persons or agents engaged in such traffic, nor of the kinds of liquors sold by them, but allegorical and metonymical descriptions of the occupation of such persons or agents, and of the nature and tendencies of such traffic, and of the effects of the excessive use of such liquors; and that, as thus understood, the publication is true, and was a justifiable criticism upon the plaintiff's vocation.

Let us now examine this piece of writing, and search out its meaning.

It is to be read and construed by you, sitting as jurors, precisely as you would read and construe it at your own

firesides. In entering a court of law, it has brought with it no new rules of construction. It purports to be an allegory. It bears for its caption the words, "A Dream."

This kind of writing is among the earliest known to the history of letters. In every age it has been among the commonest modes of conveying thought and feeling. Dr. Campbell, in his celebrated work on the philosophy of rhetoric, gives the true reason for this, viz.: "It addresses itself to the natural mind of man." It enters largely into every species of composition, sacred and profane. To it we are indebted, under Divine inspiration, for some of the most beautiful, sublime and instructive passages in the Bible. It is the foundation of all poetry, whether it be the majestic verse of Milton or the simple ballad of Burns. Its occasional introduction kindles a smile on the face of the gravest essay, while in its more constant use never wearies, but always charms in the lighter novel and tale. In adopting this kind of writing "to hold the mirror up to nature; to show virtue her own feature, scorn her own image," the defendants have but obeyed the instincts of our common humanity.

Let me point out one or two of the principal rules which should guide us in the interpretation of this species of composition. It always has a meaning, but it is not *prima facie*, a literal meaning. It should never be subjected to a forced, unhomogeneous construction. Nor should it be made to contradict itself, by construing one portion of an entire piece literally, and the rest figuratively. It should be construed as a whole, and in consistency with its general scope and tenor.

The reader is bound to take it for what the writer intended it to be, unless compelled to put another interpretation upon it. To this end he should get at the mind of the writer, the scene before him, and his object and aim.

The law, in actions of libel, always asks, what did the writer mean—how shall we understand him? And the best criterion to decide these questions is to inquire, how would an intelligent reader, who was acquainted with the subject matter and with the feelings of the writer, and who appre-

ciated his object, and was skilled in that sort of composition, have understood him.

In the light of these rules, let us interpret this Dream.

The first paragraph shows the motive of the writer. "As we sat in our room, thinking what more could be done to advance the cause of temperance, we fell asleep," etc. There he exhibits his naked heart. Let him have the benefit of its philanthropic pulsations. What is the evil which he would remove? Intemperance—the master-curse of our country, a curse which drains it of \$140,000,000 annually, to purchase a beverage which poisons, not refreshes, which fills our alms-houses with 250,000 paupers, which crowds our jails and penitentiaries with 50,000 criminals, which instigates 200 murders annually, which causes two-thirds of the suicides, and one-third of the insanity in the nation, destroying the bodies, dethroning the reason and ruining the souls of the victims, which excites half the quarrels, and causes half the accidents which distract and appall society, which recruits an army of 500,000 American drunkards, curses to themselves, pests in the community, entailing disgrace and poverty and wounds and sorrow on countless relations and friends, which mantles the nation in mourning, by consigning annually to premature graves 40,000 of its citizens, which, in a word, stands out prominently in the midst of the innumerable physical, social, mental and moral evils which afflict our race, towering aloft, the monarch of the realm.

To do what they may to arrest the march of this abomination of desolation, my clients have consecrated their lives. They saw this plaintiff busily employed in swelling this tide of ruin. They sketched his likeness and hung it up before the public eye, that strong and virtuous men might abhor him, and weak and erring men might shun him as they would the walking pestilence. For this they deserve not only the verdict of your acquittal, but the tribute of your applause.

In this same paragraph, the defendants describe the dram-shop of the plaintiff as "that house of human slaughter," and in another as "this den of the Devil." These are figurative expressions, and I only mention this because, being

in the introductory part of the Dream, they furnish the key of interpretation to unlock the meaning of the whole. But, properly understood, was not Wilbar's shop a house of human slaughter? From all the testimony it appears that he was a large dealer in intoxicating liquors, the largest in "Rum Hollow," so-called, in Taunton. Signs bearing the words "Rum," "Brandy," "Gin," were suspended on his door, giving token of what was on sale within. Shameless exhibition of his infamous trade! His shop was crowded with hogsheads, barrels, kegs, decanters, and bottles of these liquid poisons. Night and day was it haunted with miserable creatures, to be counted by scores, in every stage of intoxication. The old drunkard, from whose brow inebriety was effacing the last lineaments of God's image, was there. The youth, sowing the first seeds of that appetite whose ripe fruits would poison body and soul, was there. Graceless woman, exchanging her virtue for rum; unsuspecting childhood, just crossing the threshold of temptation, were there. Brawling, quarreling, blasphemy, were there. The streams of liquid fire were unsealed, and constantly running, month in and month out, every hour in the day, not excepting the sacred Sabbath. At night the wretched customers of this plaintiff, who were too intoxicated to stagger to their affrighted homes, were pitched out of the doors, often by the dozen, to wallow in the mud or chill in the snow, while the inhuman author of their miseries closed the gates of hell and went home to sleep, not in the penitentiary, but in his own bed with none to molest or make him afraid. Was it not a house of human slaughter? Was it not the temple of Drunkenness, where this plaintiff, as ministering priest, offered up the daily sacrifice to his remorseless Deity? Says the poet Young:

"In our world, Death deputes
Intemperance to do the work of Age;
And, hanging up the quiver nature gave him,
As slow of execution, for dispatch
Sends forth licensed butchers; bids them slay
Their sheep (the silly sheep they fleeced before)
And toss him twice ten thousand at a meal.
O what heaps of slain
Cry out for vengeance on them!"

Our butcher, unlike those of Young's tribe, was not licensed.

The Dream goes on to say, that "the presiding genius of the place was the incarnate devil. On an elevated seat in the back part of this indescribable hell, he sat; while ever and anon there issued from his mouth flames of fire which withered and scorched the deluded wretches who had been enticed within," etc.

It is a remarkable fact that all writers, sacred and profane, serious and comic, prosaic and poetic, have installed the Devil as the presiding deity over the orgies of Drunkenness.

The prophet Isaiah, in lamenting the intemperance of his time, says, after describing the drunken feasts of the Jews, "my people are gone into captivity, and hell hath enlarged herself. Paul, in warning the Corinthians against intemperance, says, "Ye cannot drink of the cup of the Lord and the cup of devils." Shakspeare puts into the mouth of Cassio, after a debauch, these words: "O thou invisible spirit of wine, if thou hast no name to be known by, let us call thee—devil." Again: "Every inordinate cup is unblessed, and the ingredient is a devil." The writers of fiction and poetry furnish innumerable illustrations of a like character. I quote but one more, which, though long, is graphic, and helps on the argument. It is by Makay, a living British poet, and is entitled "The Dream of the Reveller."

Around the board the guests were met, the lights above them
gleaming,
And in their cups replenished oft, the ruddy wine was streaming;
Their cheeks were flushed, their eyes were bright, their hearts with
pleasure bounded,
The song was sung, the toast was giv'n, and loud the revel sounded;
I drained my bumper with the rest, and cried, "away with sorrow,
Let me be happy for to-day, and care not for to-morrow!"
But as I spoke, my sight grew dim, and slumber deep came o'er me,
And 'mid the whirl of mingling tongues, this vision passed before me.

Methought I saw a demon rise; he held a mighty bicker,
Whose burnished sides ran daily o'er, with floods of burning liquor;
Around him pressed a clam'rous crowd, to taste this liquor greedy,
But chiefly came the poor and sad, the suff'ring and the needy;
All those oppressed by grief and debt, the dissolute and lazy,

Blar-eyed old men, and reckless youths, and palsied women crazy.
"Give, give!" they cry, "give, give us drink, to drown all thoughts
of sorrow,
"If we are happy for today, we care not for tomorrow!"

The first drop warms their shivering skins, and drives away their
sadness,
The second lights their sunken eyes, and fills their souls with glad-
ness;
The third drop makes them shout and roar, and play each furious
antic,
The fourth drop boils their very blood, and the fifth drop drives
them frantic.
"Drink!" says the demon, "drink your fill! drink of these waters
mellow,
"They'll make your bright eyes blar and dull, and turn your white
skins yellow,
"They'll fill your home with care and grief, and clothe your back
with tatters,
"They'll fill your heart with evil thoughts,—but never mind—what
matters?"

"Though virtue sink, and reasoning fall, and social ties dis sever,
I'll be your friend in hour of need, and find you homes forever;
For I have built three mansions high, three strong and goodly houses,
A work-house for the jolly soul, who all his life carouses.
An hospital to lodge the sot, oppress'd by pain and anguish.
A prison full of dungeons deep, where hopeless felons languish.
So drain the cup and drain again, and drown all thought of sorrow,
Be happy if you can to-day, and never mind to-morrow!"

But well he knows, this demon old, how vain is all his preaching,
The ragged crew that round him flock, are heedless of his teaching;
Even as they hear his fearful words, they cry with shouts of laughter,
"Out on the fool! who mars to-day with thoughts of an hereafter.
"We care not for thy houses three, we live but for the present:
"And merry will we make it yet, and quaff our bumpers pleasant."
Loud laughs the fiend to hear them speak, and lifts his brimming
bicker,
"Body and soul are mine!" quoth he—"I'll have them both for
liquor!"

Was not the author of our Dream right when he installed
the incarnate Devil as the presiding deity of William Wil-
bar's dramshop?

The Dream further says: "Around the store were ar-
ranged casks, barrels and demijohns, some of which were la-
belled as follows: Man-killer, Maniac Beverage, Orphan

Maker, Soul Destroyer, The Devil's Syrup, Drunkard's Cough and Delirium Tremens, etc."

Of course, this is not literal. It is the use of the rhetorical figure called metonymy, *i. e.*, putting the effect for the cause. The passage simply means that the excessive use of the liquors sold by the plaintiff often produced the effects named in these labels. As thus interpreted, the passage is true.

Ardent spirits are a "Man-killer." They destroy life by producing disease. Speaking to this point, how frightful is the catalogue of Milton:

"All maladies
Of ghostly spasm, or racking torture, qualms
Of heart-sick agony, all feverous kinds,
Convulsions, epileptics, fierce catarrhs,
Intestine, stone and ulcer, cholic pangs,
Demoniac phrenzy, moping melancholy,
And moon-struck madness, pining atrophy,
Marasmus, and wide wasting pestilence,
Dropsies and asthmas, and joint-racking rheums!"

What a fearful list of diseases, produced by intemperance, did Dr. Jewett give us from the stand. He also quoted that the intemperate patient was more difficult to cure than others, his habits baffling the skill of the physician. Says the celebrated Dr. Rush, "Spirituous liquors destroy more lives than the sword. War has its intervals of destruction; but spirits operate at all times and seasons upon human life." He adds that "ardent spirits dispose the system to disease of all kinds." To the same effect is the testimony of all the distinguished physicians of this country and England, and of all the leading medical societies in both nations.

But ardent spirits instigate to murder, produce death by suicide, accidents, and various other means, and so are properly called "Man-killer." Sir Matthew Hale, the great light of criminal jurisprudence, says, "if all the murders, man-slaughters and rapes which have been committed during the 20 years I have been on the bench were divided into five parts, four of them would be found to have resulted from intemperance." Says a distinguished French lawyer, "of 1129 murders committed in France during four years, 446 were the consequence of quarrels in tippling-houses." The

Coroner of London said recently, "I think intoxication is the cause of one-half the inquests that are held in the metropolis." Rev. Dr. Cathcart, of Pennsylvania, kept an account of all the murders committed in this country in one year. He says, "of the 209 murders, a very large proportion are known to have been occasioned by the immediate use of ardent spirits." The late Chief Justice Parsons said, "I have been so long in the habit of hearing criminals of all grades refer all their miseries to intemperance, that I have ceased to ask them the cause of their ruin." S. Chipman, Esq., who has visited every penitentiary, jail and workhouse in the State of New York, in search of facts, says that, in his opinion, "more than five-sixths of the persons committed on criminal charges are intemperate." Hugh Maxwell, Esq., of New York city, has stated, that of the twenty cases of murder tried by him while prosecuting attorney, every one was caused by intemperance. I have lying before me a mass of testimony to the same effect from judges, prosecuting officers, and wardens of State prisons, all over the country. I will not weary you with detailing it. Rev. Mr. Curtis, the worthy Chaplain of our own State prison, has told you from the stand that, in his opinion, from an observation of the causes of crime for twenty years, more than three-fourths of all the crimes, from the petty assault up to red-handed murder, are attributable to intemperance. Dr. Jewett has testified that the number of deaths in our country annually, caused by drunkenness, is more than 35,000.

But, we find proof lying at the very door of the plaintiff's shop, that rum is a man-killer. The poor wretch Kenny, a regular customer of Wilbar's, staggers from his counter and in two days dies in a horrible fit of delirium tremens. Poor Barton, another constant customer of Wilbar's, and whose widow with her weeds fresh upon her brow, has told you the sad story of her husband's fate—he seizes an axe in a fit of delirium tremens and attempts to slaughter his wife and children, and finally dies in the Worcester Asylum. Truly is rum a man-killer, and William Wilbar traffics in "distilled death and liquid damnation."

So are ardent spirits a "Maniac Beverage." Dr. Jewett has told you they are a fruitful source of insanity. The reports of the Worcester Asylum abundantly attest this truth. Of the 272 patients admitted in one year, the insanity of 56 was caused by intemperance, and I select but an average statement. Out of 495 patients admitted into the Lunatic Asylum, in Liverpool, 257 came to that state through intemperance. Well might the drunken Cassio say, "O that men should put an enemy in their mouths, to steal away their brains!" And truly does Holy Writ say of men like this plaintiff, "Cursed is he that putteth the cup to his neighbor's lips!"

So are ardent spirits an "Orphan Maker." They make wives widows, and children fatherless. They send both parents to early graves—the father dies with delirium tremens, the mother hides her broken heart in the tomb, the children find their refuge in the almshouse. We may say of this infamous plaintiff, "He hath no children!" for, methinks, a father would pity and spare.

Rum is also a "Soul-destroyer." Well did Rev. Mr. Curtis define the soul to consist of the reason, the will and the affections. All these, intemperance destroys. Nor can we forget that awful passage of Holy Writ, "No drunkards shall enter into the kingdom of God." Woe to this plaintiff when Divine Justice "maketh inquisition for blood!"

Ardent spirits are "The Devil's Syrup." This is an apt name for what the eloquent Robert Hall called "distilled death and liquid damnation." Wilbar did sell the Devil's Syrup, and he was the Devil's agent. *Qui facit per alium, facit per se.*

Rum is the "Drunkard's Cough and Delirium Tremens." Dr. Jewett has described to you the peculiar cough of the drunkard, and has told you that nothing else produces delirium tremens but alcohol. So say all the authorities. Of all the diseases which appal mankind, delirium tremens, the trembling delirium, the fearful madness, is the most horrible. This terrible insanity summons around the bedside of the tortured wretch all that is loathsome on earth and frightful in hell. Other kinds of madness are often accompanied with

pleasing delusions, this never. At one moment the sufferer fancies himself covered with disgusting vermin. At the next, legions of devils glare upon him and torment him before his time. Methinks the sacred penman must have had this appalling disease before him when he spoke of the wrath of God as "the cup of trembling"—the cup of tremens! May a merciful Providence never commend to this plaintiff the fearful cup which he so often applied to the lips of his neighbors. May he never meet the fate of Kenny and Barton, whom his murderous vocation sent to the bar of God before their time.

The passage of the Dream on which I have been commenting, also states that signs were nailed to the walls of the plaintiff's shop, bearing inscriptions like these: "Men Trained Here for the Gallows. Lessons Given in Suicide. Children Instructed in the Road to Death!"

The same remark applies to this part of the passage, as to the other. It is not literal, but is a metonymical description of the liquors sold by the plaintiff—putting the effect for the cause. It is in evidence that by the door of this shop were signs bearing the words Rum, Brandy, Gin, etc. These, and other similar liquors were largely sold by the plaintiff. According to our rule of construction this passage of the libel is true.

Ardent spirits do "Train Men for the Gallows." I have already shown that a large share of the murders are caused by intemperance; and, therefore, the dramshop furnishes a large share of the victims for the extreme penalty of the law. Two of the recent murders in this State, for which the offenders have been executed, were committed through the influence of intoxication. The rum seller and the hangman stand to each other in the relation of producer and consumer. The one trains men for the gallows; the other hangs them on it.

Intoxicating liquors do Give Lessons in Suicide. Suicide is self-destruction. Mankind are suspended by "the brittle thread" over the grave. He who cuts that thread by a single stroke of his own hand and drops into eternity, is a self-

murderer. He who wears away its fibres by constant friction, and weakens it, so that it prematurely breaks, is also a self-murderer, a gradual suicide. Intemperance produces both these results. An able medical writer states that more than half the suicides in this country—I now speak of direct and instantaneous self-murder—are committed through the influence of intemperance. You recollect the statement I read from the coroner of London that intoxication was the cause of half the inquests held by him. As to gradual self-murder, we have the testimony of Dr. Jewett, that in America, intemperance, by slow but sure steps carries its tens of thousands to an annual grave. Dr. Rush declares that “the constant use of ardent spirits, like a bold invader, seizes on the very vitals of the constitution, and does not give over till it has destroyed its victims.” On this point, the testimony of medical men is overwhelming. Then, figuratively, William Wilbar’s shop was an establishment where lessons were given in self-destruction. No thanks to him or his accursed trade, that half his customers, long ere this, have not, with suicidal hands opened to themselves the Gate of Fear.

The dramshop does “Instruct Children in the Road to Death.”

It is in evidence that children were often seen in and around the plaintiff’s shop, sometimes in search of a drunken father, sometimes to purchase rum, sometimes as spectators of, or participants in the Bacchanalian revels over which Wilbar and his great partner, the Devil, presided.

Does intemperance lead to death? Who doubts it? Is the child apt in following the example of his elders, especially his parents? Says Solomon, train up a child in the way he should go, and when he is old he will not depart from it. Pope’s expressive line has become an adage—just as the twig is bent the tree’s inclined. Says the same philosophic poet:

Vice is a monster of so frightful mien,
As to be hated needs but to be seen;
Yet, seen too oft, familiar with her face,
We first endure, then pity, then embrace.

WILBAR AGAINST WILLIAMS.

The admitted fact that the offspring of intemperate parents are more apt to become intemperate than those of sober progenitors, arises also from another cause, viz.: the appetite for strong drink acquired by the parent is, by natural generation, communicated to the child. This appetite is a disease; and like many other diseases, is hereditary. Aristotle says, "Drunken women bring forth children like unto themselves." Dr. Darwin thus expresses himself, "all the diseases arising from drinking spirituous liquors, are liable to become hereditary, even to the third generation, gradually increasing, if the cause be continued, till the family becomes extinct." The celebrated Dr. Caldwell says, "By habits of intemperance, parents not only degrade and ruin themselves, but transmit the elements of like degradation and ruin to their posterity." See also, the testimony of Dr. Sewall, in his *Pathology of Drunkenness*, page 14, and a large accumulation of facts and opinions in the Prize Essay called *Bacchus*—two works which I commend to the careful study of this plaintiff, and which will teach him that his dramshop is the gateway of hell, opening the avenues of death to the old and the young. And if his learned counsel will con them over, he will be satisfied of the truth of the inuendo he has thrown into this part of our Dream, namely, that the plaintiff was engaged in the detestable crime of corrupting the minds and hearts of the youth of this Commonwealth.

The Dream also states, that "Directly over the place where Wilbar stood, were suspended a skull and cross-bones." Although the counsel who drew the declaration has twice set forth this passage, he has not seen fit to append to it any inuendoes. He seems to be at fault in divining its meaning. I will assist him in interpreting this part of the Dream. The skull and cross-bones are the emblem of death. They are sculptured on grave stones to tell the passer-by that Death has been busy there. How appropriately, then, is this death emblem suspended over the head of the human butcher who slaughters mankind in Rum Hollow, in Taunton?

We have now reached that passage in this publication,

where the plaintiff, when driven from every other spot, will take his stand and ask for your verdict. I will read it:

"Customers now flocked in, some cursing and swearing, others quarreling and fighting. Among the number was a young man who stepped up to the counter and called for a glass of Lucifer's Elixir. At this moment a fiendish chuckle was heard, and Wilbar, looking towards, the Devil, *clapped his thumb upon his nose and with a significant look, which was answered by his majesty*, proceeded to pour out the burning liquid. The young man drank to the very bottom of the glass and with a horrid yell fell down dead upon the floor. His pockets were immediately rifled of their contents, and lest life should not be entirely extinct, another glass was poured down his throat."

I mention here (and it will become important soon), that in his declaration the plaintiff has omitted those words which I have marked in italics.

He insists that, however it may be with the rest of the Dream, the writer has, in this paragraph, departed from the line of the plaintiff's vocation as a rum seller, and charged him specifically and literary with the crimes of murder and robbery. In his various inuendoes he says, this paragraph means that "the young man drank of a beverage given to him knowingly and maliciously by said Wilbar, whereby he died; that the said Wilbar, by force of arms, did violently and feloniously take the property of that young man, so deceased as aforesaid, and appropriate the same to his own use; that said Wilbar wilfully, wickedly and with malice aforethought, did with force and arms make an assault upon the said young man, and whereby he wilfully and designedly took his life, with the intent thereby to rob him of his money, goods and chattels; that by the aiding and abetting of Wilbar, men were wilfully and maliciously killed; that he administered to some person in his shop a deadly poison which caused instant death; that he committed the sacriligious and felonious act of robbing from the dead," etc., etc.

Now, may it please your Honor, we ask the Court to instruct the jury that the plaintiff is bound to satisfy them that the meaning set forth in his inuendoes, is the true meaning of the paragraph, and that if they find it does not mean what

the plaintiff has set forth, then he has, so far as this paragraph is concerned, failed to make out his case; and this, too, even though they should be of the opinion that the paragraph, rightly construed, is libellous, and the defendants have failed to prove it to be true.

We also ask your Honor to instruct the jury that if they find that by omitting the words "clapped his thumb upon his nose, and with a significant look, which was answered by his majesty," the plaintiff has altered the meaning or changed the sense, or has confused the meaning and rendered the sense doubtful, that then he must, so far as this paragraph is concerned, fail in his action; for, he has not set out the libel which the defendants published. That this is sound law, I submit to you, gentlemen of the jury, two questions. First, does this paragraph mean what the plaintiff has set forth in his inuendoes? Second, what does it mean, when fairly construed?

This paragraph is to be read in the light of the whole article, and in consistency with its general character and scope. When it purports to be and is, in its outlines and in its details, an allegory, a dream, you should, before consenting that any part of it is a literal statement of events which transpired, be forced to that conclusion.

Now, did a young man call for a glass of Lucifer's Elixir, literally? Was a fiendish chuckle heard, literally? Did Wilbar look towards the Devil, literally? Did he clap his thumb upon his nose, literally? Was his significant look answered by his majesty, literally? Gentlemen, there is not one of you who, at the first glance, does not see that this is a mere fancy sketch. Then, for the same reasons that you believe this to be a fancy sketch, you must believe the rest of the paragraph to be but a continuation of that sketch. No man but this plaintiff, no thing but this writ, is so absurd as to believe that the writer, with no other passport but a comma, suddenly leaped from the airy regions of fancy to the terra firma of reality. Then, Wilbar did not literally pour out the burning liquid, for there was no Lucifer's Elixir there. The young man did not literally drink it, for there was no

young man there who called for Lucifer's Elixir. He did not literally fall down dead on Wilbar's floor, for he was no more literally there than was the Devil. And, not being there nor falling down dead, another glass of Lucifer's Elixir was not poured down his throat, nor were his pockets rifled.

Thus, gentlemen, all these terrible inuendoes, which the fertile or frightened imagination of the learned counsel has conjured up, vanish into thin air on examination, as Macbeth's ghost vanished on being questioned. I think the counsel must have been dreaming when he drafted this part of his declaration. And he might well go to sleep over a writ three yards long. This, too, will account for his leaving out those words, the very key which unlocks the meaning of the whole passage.

But, say you, what had the writer in his eye when he penned this paragraph—what meaning did he intend to convey? This. He was sketching with a free, bold pencil, what might naturally happen, and what has happened a thousand times, in such low, filthy, cursed tippling houses as that kept by William Wilbar. He meant to write it so plainly that he that runs might read it, and a wayfaring man though a grog seller, need not err in regard to it, that rum murdered men, and that the rum seller who filched money from the pockets of his customers and gave them rum in return, was a robber; and, gentlemen, look you there, and Behold the Man!

I have now gone through with the main points in those parts of this dream which the plaintiff has incorporated into his writ. He has omitted many portions of it, and I follow his example. I have dwelt long upon this part of the case, because I wished to satisfy you beyond all reasonable doubt that this whole publication was written of the plaintiff in his vocation as a dealer in spirituous liquors, in violation of law; and that, in its outlines and details, it is true, and is a justifiable criticism upon his vocation. And, so ample has been our proof that I feel authorized to brand this Dream, with all its glowing epithets and lines of fire into the forehead of this man, telling him to wear it as a fitting frontlet, that

the world may take knowledge of his character and occupation.

Gentlemen of the jury, I think I must stop here and ask for your verdict. But, as it is impossible for me to divine your thoughts, and as it is but discharging a duty I owe to my clients, to leave no part of this case unexamined, I will investigate the only remaining question submitted to your decision.

If, on all the issues I have argued to you, you should find for the plaintiff, an important question then arises: What damages shall he recover at your hands?

The foundation of the action for libel is, that by the publication complained of, the plaintiff has sustained an injury which he seeks to repair by compensation in damages. In the present case, William Wilbar alleges in his writ, with vast amplitude of statement, that this Dream has injured his business and stained his character; and he comes to your bar and asks for money to repair his losses in trade and reputation.

The plaintiff sets forth in his list of grievances that he was engaged in a wide and profitable business, that he was diligent in trade, that he was carrying on his business with the reasonable expectation of thereby gaining an honest livelihood and a just preferment and good estimation with all the good and honest citizens of Taunton, that he was a true, honest, just and faithful citizen of this Commonwealth, that by his diligence in trade he had obtained a good name, fame and credit among his honest, worthy and reputable neighbors, and that these defendants, envying his reputation, and maliciously intending to bring him into public scandal, infamy and disgrace, and ruin his wide and profitable business with those good and worthy citizens of Taunton with whom he was honestly, justly and truly dealing in his occupation, published of and concerning him, in his said trade and occupation, this false, infamous dream, thereby greatly injuring him in his lawful calling, bringing him into great reproach and scandal, and causing him great disturbance and anxiety of mind!

Believe me, gentlemen, when I say that I have not been reading from a dream, but from the plaintiff's writ; and that I have given you scarcely a tithe of those allegations of a similar character with which it abounds! Surely, if a twentieth part of this be true, these defendants should expect no mercy from you. But Divine inspiration need hardly have told us that "a man seemeth right in his cause, but his neighbor cometh and searcheth him." Let us examine this catalogue of grievances.

Have the defendants, by this publication, injured the plaintiff's wide and profitable business? There is not a shred of proof to support the charge. But suppose it be true. The defendants are entitled to the gratitude of this man for circumscribing, for utterly destroying a business which was ruinous to him, to his customers, to the community in which he dwelt. For every glass of liquor he sold, he was liable to indictment, to fine, to imprisonment. If he had his deserts, where would he be now? All his companions in this diabolical trade could scarcely furnish money enough to pay the debt he owes the Commonwealth for violating its laws. And he is here asking those laws to give him money? They owe him nothing but impoverishment and ruin. Were his life stretched out to the length of Methuselah's, it would hardly suffice to serve out the imprisonment the law would inflict upon him. And he dares to come into a court of justice and ask for money!

Was he diligent in trade? Aye, diligent in making paupers, in robbing the poor of bread, in instigating men to commit crimes, in crowding our alms-houses, our jails, our penitentiaries, our insane asylums, our graveyards, with the plundered, maddened and murdered victims of his vocation. And our publication has made him less diligent, more languid in this his trade; for which he asks you to put your hands in our pockets and get money for him.

He says we have deprived him of his customers. Where is the proof? He has offered none. True, we have shown that two of his constant customers trade no more with him. Kenny, who died of delirium tremens almost at his threshold,

will never stand at his counter again. Barton, who went from his shop to die in a madhouse, will trade no more with him. How much money will you give him for the loss of these customers?

And, was it this Dream which brought him into scandal and reproach among the good and worthy citizens of Taunton? No, it was the reality, not the dream! It was not this publication, but his occupation, which made him infamous. And, in the name and behalf of every good and honest citizen, in Taunton, I indignantly deny that by his business he was obtaining among them a just preferment and good estimation. I repel the foul calumny, and tell him that it is through their long suffering and forbearance that the doors of his pest-house were not forcibly closed and he driven from the town in disgrace.

And did our dream cause him great disturbance and anxiety of mind? It was high time that something had filled him with anxious thoughts. The kindly suasion of his temperate neighbors, the tears of the orphans he had made, the beseechings of the widows he had clothed in weeds, the curses of the infuriated Barton, the terrible agony and frightful death of Kenny, all these had not moved him. The quarrels which he daily instigated, the blasphemies which continually rung in his ears, the slow but sure work of death which he saw going on around him, all these had not moved him. The law, at long intervals, waking from its torpor, visited him with its retributions. Still he went on, diligent in his vocation, plundering, torturing, poisoning, adding fresh fuel to consuming fire, without feeling one remorseless pang, one anxious thought. By all that is precious on earth and sacred in heaven, if these defendants have been able to penetrate the seat of feeling in the bosom of this indescribable wretch, they are entitled to the applause of men and the favor of God!

But, says this writ—and it is a rare production—William Wilbar was a true, honest, just and faithful citizen of this Commonwealth, pursuing his lawful calling! Gentlemen, this is too bad! First comes Williams with his allegory, and says that Wilbar is the devil's agent. Then comes the counsel

with his allegory, and says he is a faithful citizen, pursuing a lawful calling. There was one man on earth from whom even William Wilbar might rightfully expect sympathy—his retained and feed counsel. And though the hand of every other man should be turned against him, his arm should be stretched out in his defense. And now, to be taunted by him in open court, with pursuing a lawful calling, is heaping insult upon injury. Why, it is a violation of the Constitution of the United States, which declares that cruel and unusual punishments shall not be inflicted!

But, gentlemen, the plaintiff is here after money. What injuries have we inflicted upon him as a rum seller? What good deeds has he done in that vocation, which entitle him to take money out of our purse? He has long enjoyed special privileges; and is he not content with those? Unlike you and I, he can inflict great injuries upon the community with impunity. By his business, he can commit assaults and robberies; he can make paupers and felons, and not be held responsible therefor. He can make rich men poor, wise men fools, sober men crazy, virtuous men felons, without let or hindrance. If you and I call a man a bankrupt, or a madman, or a thief, or a robber, we must respond in damages in an action of slander. But he can make men bankrupts, madmen, thieves and robbers, aye, and by diligence in trade can kill them, and lo, if you and I say so and print it, he can be the plaintiff in a libel suit, and we must defend ourselves as we can. So, this man can levy taxes on the community, and make the community pay them too. The rum-pauper tax of this State is about \$300,000 annually. The rum-criminal tax is some \$10,000 or \$15,000 annually. This tax is levied by William Wilbar and the like of him. And we pay it. But if the Legislature wish to lay an annual tax of \$70,000, to carry on the government, the whole State is up in arms from Berkshire to Barnstable. And yet, this same people bear these rum taxes with a quiescent humility that would do honor to a starved and scourged donkey. So, if this plaintiff, for the sake of gain, sells worthless or poisonous articles, he can take money therefor, while for doing the

same thing, the provision dealer is indicted and punished. So, if this plaintiff, for gain, infuriates his customers with rum, knowingly and wilfully, and they commit batteries, larcenies and murders, he, unlike other accessories, escapes, while the law inflicts its vengeance upon the poor dupe of his trade and occupation, letting the principal go and punishing the agent—yea, it may be, permitting the seducer to sit upon the jury which condemns his victim.

And now, gentlemen, William Wilbar has participated largely in the enjoyment of these special privileges. And not content with the advantages which these monopolies confer upon him in his trade and occupation, he has the modesty to ask for more. He wants you to help him to get money. He has become so accustomed to living by plunder without law, that he has grown bold and hopes to plunder by aid of the law.

And for what acts of his rum-selling life does he ask you to give him money? Let him present us with his bill of particulars. Let him make out his account current with the defendants, the community and the law. I ask for the items. How much will you give him for the disease he has instilled into the bodies of his customers, by his diligence in trade? How much for reducing them to beggary? How much for palsyng their limbs, blighting their minds, ruining their souls? How much for breaking the hearts of their widowed wives, and sending their starved children to the alms-house? How much for destroying Kenny and Barton? How much for undermining the foundations of social order, trampling on the laws, and contributing all in his power to swell the tide of intemperance which pours over the land, blasting everywhere, cursing everything? Before I consent that my clients pay him one farthing, I demand his bill of particulars "for work and labor done, and materials for the same provided."

But, gentlemen, if money must be forth-coming for this plaintiff, of whom will you exact it? Surely, you will not go to the poor widow of Barton and ask her to sell her weeds to raise money for the destroyer of her husband. You will

not do that. Will you go to the penniless heirs of Kenny, whom Wilbar robbed of a father, and ask them to take the bread from their mouths and give it to him? You will not do that. Will you go to the poorhouses and jails, and work-houses, and insane asylums, and penitentiaries, and search out those whom his trade has sent thither, and ask them to contribute money to the wretch who has ruined them? You will not do that. Will you go to the graveyards, to which his trade and occupation sent their annual contributions, and disentomb the dead, and sell their skeletons to the anatomist, to raise money for the keeper of a house of human slaughter? You will not do that. Passing by all these, will you come to the law-abiding, generous-hearted, gallant young philanthropists now at your bar, who, in the discharge of a high civil and moral duty which they owed to society in sustaining the supremacy of the laws and restraining immorality and alleviating human misery, painted with a bold pencil this monster and his den, and held the picture up to public gaze, that all men might know him and abhor him and shun him—will you come to them and exact money and give it to this vile wretch? No! You will not do that!

Let me remind you, gentlemen of the jury, that the case of *Wilbar v. Williams*, Hack & Bradbury, is not all which will be involved in the verdict you may render.

Public virtue, sound morality, the welfare of society, are on trial, and anxiously await your decision. Pursued, overtaken, outraged, these precious interests flee to you for succor and protection. Let the halls of Justice be their inviolable asylum. Let them here find their home and their friends.

The cause of society is on trial. Intemperance, the pestilence which walketh in darkness and the destruction which wasteth at noonday, covers the land with sadness and shame, with sin and sorrow. Shall honest, generous, well directed efforts to stay its march be visited by punishment, while those who minister to its virulence go unwhipped of justice? Then has judgment fled to brutish beasts and men have lost their reason.

The supremacy of the laws, the authority and perpetuity

of civil government, are on trial. I cannot but regard these constant and unpunished violations of our license laws, as tending to undermine the very basis on which our free institutions rest. These violations are injurious to the cause of sobriety. Our fathers erected these barriers all around our borders, to beat back the waves of intemperance, so that they might not overwhelm our good old Commonwealth. And the advancing knowledge and enlarged experience may have disclosed many defects in them, yet the safety of the State requires that they be firmly upheld till stronger and higher barriers are erected in their stead. This plaintiff has combined with the thousands of rum sellers in Massachusetts, to prostrate these walls of defense, and let in the surges of drunkenness to sweep unrestrained through the land. He is a bad citizen, the enemy of his country, guilty of moral treason. An importer of famine and pestilence would be less guilty. The man who should give succor to our foes in war, or open the gates of our citadel to hostile armies, would not more deserve the name of traitor. But, I regard these repeated violations of our laws as still more injurious, because of the dangerous tendency of their example. Beware of bad precedents. *Obsta principiis*. If the license laws may be broken with impunity, so may any other and all other laws on our statute book. Witnessing the indifference which so lamentably prevails in regard to the resistance of the laws by the rum seller, other classes of men will be emboldened to set other portions of our code at defiance, till pillar after pillar of the social edifice falls, and the whole becomes a mass of shapeless ruins. Said the great Lord Chatham, when resisting the illegal encroachments of the British Crown upon the liberties of the people, "this I know; where law ceases, there despotism begins." Let us then, gentlemen, regardless of our opinions on the subject of temperance, band together, hand in hand, to save our civil institutions from prostration. Impelled by the instincts of self-preservation, let us stand by the law and vindicate its supremacy. But, higher motives than this should influence you. The jury-box is the guardian of social order. Prove not recreant to

your trust here. Teach this plaintiff that for him and his clan you have nothing to give but retribution and infamy.

The liberty of the press is on trial, and waits for your verdict. Of all the instrumentalities for good or for evil, which exist among a free people, the liberty of the press should be watched and guarded with the most jealous care. Often has it been the last resort of freedom in its conflict with tyranny. Said Milton, the republican of Charles the First's time, "give me the liberty to know, to argue and to publish freely, above all other liberties." Said the illustrious Chatham, "Let there be a weak Prince, a wicked Minister, and a corrupt Parliament, and give me a Free Press, and the Constitution is safe—the liberties of the people are secure." The brightest jewel in the professional diadem of the great English advocate Erskine, was his successful resistance to the rule of law expounded by the judges, that in criminal prosecutions for libel the proof of the truth of the writing and of the good motives which caused its publication were not a complete defense. By the aid of Charles James Fox, the great Commoner, this once discarded rule became the law of the British Empire; and now the people of England may breathe their discontents, may thunder their denunciations even, in the very ear of Majesty. Justly prizing this great right, our ancestors provided guarantees for its protection in the organic law of the Republic and of this Commonwealth. The Constitution of the United States provides that "Congress shall pass no law abridging the liberty of the press." The Constitution of Massachusetts declares that "the liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this Commonwealth." These defendants are the editor and the printers of a public newspaper. Jefferson denominates the men of this class, sentinels on the watch-towers of freedom. In publishing the article for which they are now arraigned, were they true or false to their trust? The plaintiff was a traitor to his country and his kind. Human and Divine law were at war with his vocation. Virtue, humanity, law and religion had appealed to him to abandon that vocation.

They had appealed in vain. These defendants, deeply moved at his crimes, and regarding their high mission as conductors of a free press, gave utterance to the indignant voice of an outraged and long suffering public sentiment. And by Heaven, if they have been able to arrest or impede him in his guilty career, they are entitled to his thanks and your verdict. Yea, I take stronger ground. Such are the relations which this plaintiff sustains to the laws of this Commonwealth and to society at large, that if this publication were the most scandalous ever uttered, and these defendants the most despicable wretches that ever defiled the earth, William Wilbar is not the man to come into a court of justice and say so.

But, gentlemen, I have detained you too long. From all the testimony in this case, the plaintiff must be regarded as the keeper of a dramshop of more than an average degree of infamy, and the portrait shadowed forth in this Dream as only a faithful likeness of the man and his occupation. If the features be Satanic—if the general impress and mien be fiendish—if every virtuous eye which scans it, kindles with indignation—if its exhibition has sunk the original so low in public esteem that even contempt scorns to follow him—the fault is his own—not the limners. In the discharge of a duty which they owed to God and man, they have sketched him faithfully, nothing extenuating, nor setting down aught in malice. By your verdict, then, stamp this Dream, with all its blistering epithets, upon the audacious forehead of William Wilbar. Forget not, that in reaching your bar he has trodden that law in the dust which gives protection to your rights and dignity to your office. He has poured contempt on its majesty, scorned its precepts, defied its penalties, and despised its ministers. So far from shielding him by your verdict, drive him hence with indignation, and let him thank Heaven that he was not scathed by its vengeance when he dared to invade the Temple of Justice on such an errand as that which brought him here.

Mr. Coffin addressed the jury at some length, confining his speech for the most part to the question of damages.⁸

THE CHARGE TO THE JURY.

JUDGE HUBBARD. Gentlemen of the jury: We live under a government of laws, designed to protect every man's life, liberty, and reputation. The plaintiff avers in his writ that he is a good, worthy and peaceable citizen of this Commonwealth, and, at the time of the publication complained of, was pursuing an honest and respectable business as a grocer, in the town of Taunton. That the defendants, envying his good name and reputation, and seeking to bring him into disgrace, have published of and concerning him, a false, scandalous and malicious libel, by reason of which he has been injured in his reputation and business. And, to repair these injuries, he has brought this action.

HIS HONOR then gave a lucid history of the law of libel, and pointed out the modifications which it had undergone, especially in this State, during the last thirty or forty years. He defined a libel to be "a malicious publication, expressed either in printing or writing, by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt and ridicule." He then pointed out some of the changes which had taken place in the grounds of defense for publishing libels, and drew the distinction in this respect between civil actions for damages and criminal prosecutions by indictment.

Formerly, it was held as settled law, that "the greater the truth, the greater the libel," and the truth of the charges contained in the publication, was no justification for their utterance, nor would the proof of their truth on the trial be al-

⁸As the only published report of the trial was issued and distributed in the form of a "temperance" pamphlet by the defendants, *Mr. Coffin's* speech to the jury was purposely omitted. On this point the editor of the *Dew Drop* naively says: "This document is intended for the benefit of the temperance cause; this, therefore, will be a sufficient apology for the non-publication of *Mr. Coffin's* argument, although in the opinion of gentlemen versed in legal matters it will seem incomplete."

lowed. This was alike the rule both in civil and criminal cases. In more recent times, these principles, and the practice under them, had been essentially changed. In 1826, the Legislature of this State passed a declaratory act in regard to what should constitute a sufficient defense in a criminal prosecution for a libel. The provisions of the act of 1826, were substantially incorporated into the Revised Statutes. In chapter 133, section 6, the law is thus laid down:

"In every prosecution for writing or for publishing a libel, the defendant may give in evidence, in his defense upon the trial, the truth of the matter contained in the publication, charged as libellous; provided, that such evidence shall not be deemed a sufficient justification, unless it shall be further made to appear on the trial, that the matter charged to be libellous, was published from good motives and for justifiable ends."

For the purposes of this trial, our business is confined to those rules which govern civil actions for damages. As contended by the counsel for the defendants, and admitted by the counsel for the plaintiff, it is now well settled, that in civil actions for libel, the proving of the truth of the publication, at the trial, constitutes a complete defense for making it; and this, too, without regard to the motives which actuated the defendants in making the charges, or the injury which the plaintiff may have sustained thereby. If he has suffered great damage in consequence of the publication, and if the motives which influenced the publisher in thus holding him up to the world were bad, still, if the defendant proves his charges to be true, the plaintiff has no remedy by civil suit, and his assailant stands acquitted in the eye of the law. Nor does the law in this respect depart from sound principles of justice. If a man has been guilty of crimes, or if he pursues an iniquitous business, or if his character be infamous, it is not for him to come to the law for damages because his character and his calling have been described before the public in their true colors. True, if the faults or the crimes of a bad man are held up to the world for no good purpose, for no justifiable ends, the Commonwealth may interfere by indicting and punishing the publisher. But, the law will not

allow a bad plaintiff to profit by his own iniquities, by recovering damages from a bad defendant to be put in his own pocket.

In the outset of this case, then there are three important questions for the jury to settle: 1. Is this publication—the Dream—a libel? 2. Was it published of and concerning the plaintiff? 3. Was it published by all the defendants?

As to the first point, probably the jury, in view of the definition of a libel which the Court has given, will have no difficulty in arriving at the conclusion that this Dream is a libelous publication, provided it be false, and therefore malicious. This is admitted by the defendants' counsel.

As to the second point, the jury will examine all the evidence introduced on both sides, and say, whether the publication refers to the plaintiff. Here the burden of the proof is on the plaintiff. He must satisfy you that he is the person specially designated in this Dream, as the keeper of "that house of human slaughter." Witnesses have testified that on reading it, they thought it referred to the plaintiff. They give you various reasons for this belief. Some give as the reason that he kept a large liquor store in "Rum Hollow"—that he generally had a large number of drinking customers in and around his shop—that there were signs up at the door with the words Rum, Brandy, Gin, etc., upon them, etc. Some give as the reason that an old man with spectacles (as described in the Dream) was a clerk in this store; and others believed it referred to the plaintiff, because it appeared to them to be a faithful and apt picture, in figurative language, of his establishment. It is for the jury to say, not merely from the belief of these witnesses, but from reading the Dream and comparing it with all the evidence as to the character and description of the plaintiff's shop and the kind of business he there carried on, whether he is the person to whom it referred.

As to the third point, it is not contended that Mr. Williams, the editor and publisher, did not publish, in legal contemplation, the alleged libel. But, it is contended, that Hack & Bradbury, the other defendants, being merely job printers; having

no pecuniary interest in the Dew Drop; not selling, or mailing, or giving away the paper; but merely printing it in the way of their regular business, as they did other jobs; and, when the entire weekly edition was struck off, handing it over all at one time to Williams, or permitting him to come and take it away—this is not a publication by them. But, the Court lay down the law to be, that if Hack & Bradbury printed the newspaper for Williams, though merely as job work, knowing that he was intending afterwards to publish it; and if they handed it over to him, or permitted him to take it, knowing that he intended to publish it, and he afterwards did publish it, this was, in contemplation of law, a publication by them.

If the jury arrive at the conclusion that this is a libel, and that it was published of the plaintiff by all the defendants, then another important question arises, namely—have the defendants justified the publication by proving the libel to be true?

JUDGE HUBBARD now examined the specifications of defense filed by the defendants, and the objections of the plaintiff to their sufficiency. By the general issue the defendants deny that they published the article, and at the same time they say that if they did publish it, it is true according to its real and fair construction. They also state that it is an allegory—a figurative piece of writing, and should be so interpreted. That it was written solely to describe the character and effects of the excessive use of intoxicating liquors in tippling-houses and dramshops, and of the traffic in such liquors in such establishments. That if the plaintiff really kept such an establishment, this Dream was a justifiable criticism upon his vocation. They also state that he was the keeper of such a shop, in violation of law, he not being thereto duly licensed. The Court hold the law to be that however insufficient under the old system of special pleading, yet that system having abolished in this State, and a more liberal, general and perhaps loose mode adopted in its stead, these specifications of defense are sufficient to entitle the defendants on this trial to introduce evidence of the truth of the pub-

lication, especially as it appears that the plaintiff has not been misled and is not surprised thereby.

Then, is this publication true? The jury will inquire into its character. Is it a figurative piece of writing—is it an allegory? Look at its caption, “A Dream.” Does it sustain its allegorical character throughout? Is it, in its general scope, or in any of its details, a literal description of scenes which transpired under the writer’s eye? These questions are for the jury to determine. The defendants allege that it is a fair description of a tippling-house and dramshop. Is this so? And if it be, then did the plaintiff keep such an establishment, and is this Dream a fair description of that establishment? The leading question, the very essence of the inquiry, in looking at this Dream is, is it a fair description of a dramshop, and did William Wilbar keep such a shop? Does the article purport to be anything else? Does the proof justify its application to the plaintiff? As is contended by the defendant’s counsel, an allegory has a meaning though the meaning is not a literal one. Undoubtedly such a piece of writing must have some features of truth about it, or it would have no point.

Look, then, at the plaintiff’s shop and the kind of business he carried on there. It is urged on the part of the plaintiff that he kept a common grocery. But was that his principal business? Had he been a grocer only, he might well complain that this publication had injured him in his business. But he kept his grocery in a disgraceful place, called “Rum Hollow.” Did he sell large quantities of intoxicating liquors? Did he, in fact, keep a low, disorderly tippling-house and dramshop, resorted to by great numbers of intemperate men to gratify their appetite for strong drink? The plaintiff’s witnesses state that a good deal of rum was sold there. Newcomb swears to this effect. Leonard swears that liquor was frequently drank there, and that there were a great many casks, barrels and hogsheads of liquor on sale there. Ellis testified that the plaintiff sold more rum than any other man in “Rum Hollow,” and he thought the Dream was a fair description of his store. This is the general char-

acter of the plaintiff's testimony on this point. This evidence is fully supported by the defendants' witnesses. Crocker describes the signs at the door—Rum, Brandy, Gin, etc. For what purpose were these signs placed there? They were in fact an invitation to all to come in and drink these liquors. This witness swears that there were frequently scores of drinking men in the shop, in all stages of intoxication. When he was once in there he saw men standing at the counter, with glasses of liquor before them. He has seen drunken men pushed out of there, has heard noises and quarrelling there, both during the day time and in the night, has seen scores of intemperate men around the doors, in various degrees of drunkenness. It is for the jury to say whether this was a tippling-house—the haunt of the drunkard. Earl described the screen which stood within the door. For what purpose was this screen placed there? Why did the plaintiff seek to screen the inside of his shop from public view? The jury must judge. This witness testifies that he has seen a great many intemperate men going in and coming out of this shop, in all the stages of drunkenness. That a great deal of low company was in and around constantly. That he has frequently seen men pushed out in the day time and in the night, and fall down dead drunk. That this was often the case when they shut up at night; and he has picked up these wretches and helped them to shelter. He has seen fighting and knocking down around the door, and has heard quarrelling in the night which has called him up, and has heard much cursing and swearing in and about the establishment. He has seen persons go in there on the Sabbath. He described the case of Kenny, who was a regular customer of the plaintiff, who was an intemperate man, and who went home from his shop intoxicated, and in a day or two died in a horrible fit of delirium tremens. Tisdale, the reformed man, swears that he has frequently bought and drank liquor there, and has seen many others do the same. He has seen drunken men in and about the shop. He has seen Barton drink there frequently, and knows he was an intemperate man, and a customer of the plaintiff. This is the man who

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had the delirium tremens, and was sent to the Insane Asylum, at Worcester, where he died. Mrs. Barton, the widow of the man just named, described the habits and haunts of her late husband. He was a hard drinker, and bought his liquor at the plaintiff's. He spent all his money for rum. He had a fit of delirium tremens, and tried to murder his wife and children with an axe, while in one of these fits. He went to the poor-house, and then to the Asylum, where he died. Shattuck testified to many facts similar to those sworn to by Crocker and Earl. Without going more into detail, it is for the jury to say, in view of all the testimony, whether the plaintiff kept a tippling-house and dramshop, and whether the Dream contains a faithful description of his establishment?

At the outset of this Dream, it speaks of the Devil being the presiding genius of the place. We cannot believe the writer meant to state that the Devil was literally present in bodily form. Does not this go far to stamp the whole publication as a figurative piece of writing? The Dream describes the marks on the heads of the casks and barrels—such as “Man-killer,” “Orphan Maker,” etc. The defendants allege that these are figurative statements of the effects produced by the excessive use of spirituous liquors, and that the plaintiff kept such liquors for sale. The plaintiff, by his inuendoes in the writ, gives a very different interpretation to these epithets, namely, that the defendants meant to charge the plaintiff with the commission of high crimes and misdemeanors, such as murder, etc. It is for the jury to decide, which has set forth the true meaning. To arrive at this meaning, let the jury look at the whole article—its evident object—and compare those passages which are unquestionably figurative, with those which the plaintiff alleges are literal. Read it as you would at your own firesides. No other rules of interpretation are to be applied to it in a court of justice, which you would not apply to it on your farms and in your shops. Have we any reason to suppose the writer would depart from his general line of description, by intermixing literal with figurative passages. The article should not be made, unnecessarily and hastily, to contradict

its general character as "a Dream," an allegory. Examine it, then, in view of these obvious rules of interpretation.

If the jury think the defendants have given the true interpretation, then the question arises, are these descriptions true? Is rum a man-killer? Has not the testimony on this point been ample? Does not its excessive use shorten human life by producing disease and instigating murder? Is it properly called maniac beverage? Who has not seen men crazy with rum? Dr. Jewett has told us it is a fruitful source of insanity. If it sends parents to untimely graves, is it not an orphan maker? Does it not injure and destroy the soul, by blighting the intellect, leading captive the will and hardening the affections? Rev. Mr. Curtis, the worthy Chaplain of the State Prison, has described to us its destructive effects upon the morals of man. Is it, then, a soul-destroyer? Does it produce the delirium tremens, that awful disease which destroyed Kenny, and annually kills its thousands? Dr. Jewett has told us that excessive drinking is the cause, and the sole cause, of this *mania a potu*, which the counsel for the defendants so aptly denominated, in Scriptural language, "the cup of trembling." Then, did the plaintiff sell the liquors which produce these awful effects, and is the description in the Dream, in this respect, true? It is for the jury to decide.

The Dream states that signs were nailed to the wall, containing various inscriptions. It is in evidence that there were signs at the door, bearing the words Rum, Brandy, Gin, etc. Do these liquors lead to the results stated in the Dream, and is this part of it a fair statement of the character of the business of the dram seller? Do these liquors instigate to murder and train men for the gallows? Dr. Jewett and Rev. Mr. Curtis have both stated that at least three-fourths of all the crimes in the country, murder included, are caused by drunkenness. Does not our common observation teach us the same? These witnesses have told us that intemperance is one of the causes of suicide. May not the excessive use of spirituous liquors, both by shortening men's lives, and by leading them to commit self-murder, be said to give lessons

in suicide? And was the plaintiff engaged in a business which tends to such consequences? Was he pursuing a calling which leads children in the road to death? Might his business be properly described as producing death to the body, the morals, the soul of his customers, old and young? The jury must decide.

JUDGE HUBBARD, after similar comments upon other parts of the *Dream*, then read the passage which describes the young man who called for a glass of Lucifer's Elixir, and on drinking it, fell down dead on the floor, and had his pockets rifled. He commented at some length on this paragraph. The jury must read this passage in view of the general scope and character of the whole article. Was this a literal description of an event which actually transpired in the plaintiff's shop? Parts of it were obviously figurative, such as the Lucifer's Elixir, the presence of the devil, etc. Was it the fair interpretation of the whole passage to say that the writer suddenly changed from the figurative to the literal, from the fancy sketches of an allegory to the sober statement of facts? Was it anything more than a strongly colored picture of the effects of excessive drinking, beastly drunkenness? Is it true that extreme intoxication, in such young men as are here described, caused death—death of the reason of the affections, and often the literal death of the body? May not men, when "dead drunk," be said, in figurative language, to have fallen down dead? Does not the rum seller, who strips his poor customers of all their earnings, rob them, figuratively speaking? And is this the fair interpretation of the passage, and did the plaintiff pursue such a business? The questions are for the decision of the jury.

To this passage the plaintiff has appended various inuendoes, which he avers set forth the true meaning of it. He says the defendants have charged him with poisoning his customers, knowingly and wilfully, whereby they died—with committing the crimes of murder, and robbing the dead, etc. The defendants aver that the passage is merely a metaphorical description of the effects of excessive drinking. Which is right? The Court charge the jury as matter of law, that the

plaintiff is bound to satisfy them that his innuendoes set forth the real meaning of the writer. And, if he fails to convince the jury that he has stated the real meaning of the passage, he has so far failed to make out his case.

Then, upon the whole article—have the defendants proved it to be true, according to its fair interpretation? Here the burden of proof is upon them. If they have failed, you must find a verdict for the plaintiff. If they have succeeded, they are entitled to an acquittal.

As to the other main point raised by the defendants' counsel, namely, that the plaintiff, being engaged in an illegal vocation, could not maintain an action for a libel upon him in that vocation, the authorities brought forward by the defendants' counsel fully sustain this position. The Court instruct the jury to inquire: 1. Was the plaintiff engaged in an illegal vocation? Was he selling spirituous liquors without being duly licensed therefor? Did he keep a tippling-house and dramshop, in violation of law? 2. Was the libel published of him solely in regard to his agency in that business? 3. If the jury find both these issues in the affirmative, then the plaintiff cannot maintain this action; even though the publication be libellous, and the defendants have failed to prove it to be true.

But if the defendants have traveled out of the line of the plaintiff's vocation as a rum seller, and have attacked him in other respects, then they are so far liable. But, if the publication is of him solely in that vocation, and that vocation is illegal, then he cannot come to the law and ask it to give him damages for what is published of him in regard to a business in which he transgresses the law, even though the publication be false, and have caused damage to the plaintiff. Courts of justice will not interfere in behalf of either one of such guilty parties. Yet, while this is true of civil actions for damages, the same rule does not obtain in regard to criminal prosecutions for libel. There the Commonwealth has its rights, and is supposed to have sustained injury, and the mere illegality of the vocation of the libelled party, will

not of itself constitute a defense; though, in case of conviction, this fact might go in mitigation of punishment.

The JUDGE then made some remarks upon the great value of the liberty of the press, in sustaining the supremacy of the laws and putting down vice. Men love darkness rather than light. They evade the penalties of the law. The press discovers and lays bare their dark deeds. Men who do not fear the law, dread the press, for it exposes their crimes to the eye of the public, so that good men shun them and hold their character and their practices in just abhorrence. The voice of a free press is often the last resort of an outraged public, to rebuke and restrain vice. But while courts and juries should guard its liberty with a jealous eye, they should never give countenance to its licentiousness.

On the subject of damages, the Jury are instructed that if they find a verdict for the plaintiff, they are to give him such damages as he was entitled to under all the circumstances of this case. Otherwise, to acquit the defendants.

THE VERDICT.

After consulting about three-fourths of an hour, the jury agreed upon a verdict of *Not Guilty*.

THE TRIAL OF WILLIAM LANDON FOR BREACH OF THE PROHIBITION LAW OF THE STATE, ALBANY, NEW YORK, 1855.

THE NARRATIVE.

In April, 1855, the New York Legislature passed a statute of a character known today by the name of a "Prohibition" law, but which it called "An Act to Prevent Intemperance, Pauperism and Crime." It forbade any person in the State selling or keeping for sale intoxicating liquors, except authorized vendors, who were permitted to sell for mechanical, chemical, medicinal and sacramental uses; cider in quantities of not less than ten gallons, wines manufactured from grapes grown by the seller and imported liquor in original packages. The law went into effect on July 4 and a few days later a number of hotel keepers in the different cities were haled before the courts and charged with disobeying it. Among them was Mr. William Landon of Albany, who was the proprietor of the leading hotel in the State capital. He admitted that he had on July 6 furnished two of his guests with a couple of glasses of brandy, but he pleaded not guilty to breaking any law, because—his counsel argued—there was no law to break, as the legislature had no authority under the Constitution to pass such a statute and therefore it was void and not worth the paper it was written on. But the Judge ruled that it was neither for him, an inferior magistrate, nor for the defendant to question what the lawmaking body did; the only tribunal that could set the law aside was the State's Supreme Tribunal, the Court of Appeals. Mr. Landon then pleaded not guilty and demanded a jury, which was granted. He had as his counsel a great lawyer, who in a great speech easily persuaded the jurors that no man's property was safe if a legislature on the plea that it was for the public good could prevent a man from selling things that had always been the subject of purchase and sale. And that even

where it was clear that it was for the public good the State, if it wanted the property, ought to pay for it and not try to steal it. So the jury returned a verdict of not guilty and the Prohibition law disappeared from the statutes of the State of New York.

THE TRIAL.¹

In the Court of General Sessions, Albany, New York, July, 1855.

HON. JOHN O. COLE,² Judge.

July 20.

The defendant, William Landon, appeared on a complaint filed by Chauncey B. Williams for a violation of the "Act to Prevent Intemperance, Pauperism and Crime" of the State of New York, which was passed by the legislature on April 9, 1855, and came into force and effect on July 4, 1855.³

¹ *Bibliography.* *"Argument of John K. Porter, on the Trial at Albany, of William Landon, Acquitted July 21, 1855, on a Charge of Violating the Prohibition Law. Albany: H. H. Van Dyck, Printer, Atlas Office. 1855."

² COLE, JOHN ORTON. (1793-1878.) Born, Sharon, Conn. Removed with his parents when a youth to New York, first near Catskill Village, and then to Duanesburgh and finally to Albany, where he learned the printer's trade. Studied law and admitted to bar, 1818. In 1821 he was appointed by Governor Clinton a justice of the Sessions and a justice of the peace, which offices he held for half a century, resigning in 1870. Was a sergeant in the War of 1812. See Howell and Tenney, *Hist. of Albany Co.*, 665; *Albany City Directory* (1855); "John O. Cole, Police Justice, 144 N. Pearl St."

³ This statute has twenty-six sections. Section one forbids the sale, and the keeping for sale, or with the intent to sell, of intoxicants, except in the cases enumerated in the subsequent sections. The sales excepted from the prohibition of the first section are sales to authorized vendors, and sales by them for mechanical, chemical and medicinal purposes, and of wine for sacramental uses; also, sales of cider in quantities not less than ten gallons, sales of alcohol by manufacturers, of wine from grapes grown by the seller, and of foreign liquor in the original packages to authorized venders. Section four declares offenses against the act misdemeanors and provides for their punishment by fines and imprisonment. Section five designates the officers who shall have cognizance of such offenses, and prescribes the form of the proceedings and of the trial. Sections six and seven contain what are called the search and seizure clause; and section ten provides for the condemnation and destruction of the liquor.

Jacob I. Werner,⁴ for the People; *John K. Porter*,⁵ for the Defendant.

Mr. Porter demanded a preliminary examination, as in other criminal cases was allowed, and that the defendant should be permitted after such examination to give bail for his appearance at the next criminal court having jurisdiction of the offense and in which an indictment had also been found.*

Section twelve authorizes sheriffs, marshals, constables and policemen to serve the process, arrest persons in the act of selling, and to seize without warrant liquor kept against the provisions of the act. The owner may interpose a claim to the liquor seized pursuant to the provisions of section seven, but he must first purge himself under oath of any design to disobey or evade the law, before he can be noticed or heard. Section sixteen deprives the owner of his right of action to recover the value of any liquor sold to a purchaser, or taken, detained or destroyed by a wrongdoer, unless he shall prove that such liquor was sold according to the provisions of the act, or was lawfully kept and owned by him. And section seventeen declares, that upon the trial of any action to enforce the penalties and forfeitures, proof of a delivery shall be deemed evidence of sale, and proof of sale shall be sufficient to sustain the averment of unlawful sale. Section twenty-five declares all liquors kept in violation of any of the provisions of the act a public nuisance.

⁴ WERNER, JACOB I. Born, Albany, N. Y. The Albany Directory of 1855 shows that he was then a member of the firm of Werner & De Forest, Attorneys, 67 State street. He was also a member of the Albany Institute, which he joined in 1841. See Howell & Tenney, p. 820, *supra*.

⁵ PORTER, JOHN KILHAM. (1819-1892.) Born, Waterford, N. Y. He was one of the most noted lawyers in his State and time and his connection as counsel in noted litigation was National. In great controversies he represented the Erie Railroad and the Corporation of Trinity Church, New York City. He was one of the counsel in the famous action by Theodore Tilton against Henry Ward Beecher for *crim. con.* and was the leader for the Government on the trial of Guiteau for the murder of President Garfield. (See 10 Am. St. Tr.) He died in Waterford, N. Y.

* The jurors of the People of the State of New York, in and for the body of the county, upon their oaths present, that William Landon, on the sixth day of July, in the year one thousand eight hundred and fifty-five, at the city of Albany, in the country aforesaid, without having any lawful authority, wilfully and unlawfully did sell to some person unauthorized by law to sell intoxicating liquor, to the jurors aforesaid unknown, intoxicating liquor, to-wit: one gill of brandy—the said intoxicating liquor then and there not being alcohol manufactured by the said William Landon, or pure wine manufactured by the said William Landon, from grapes

JUDGE COLE refused such examination and refused to take bail on the ground that the new Prohibition act did not permit the prisoner to give bail for his appearance to answer for the offense charged, but required him as a Court of Special Sessions to proceed with the trial of the case.

The *Prisoner* thereupon pleaded *not guilty*, and a jury was impanelled.

THE EVIDENCE.

It was admitted by the defense that Mr. Landon was the keeper of a hotel in the city of Albany and that on the 6th day of July last, he had furnished to two guests named Johnson and Hast-

ings two glasses of brandy; that the brandy so furnished had been imported from France and that the two glasses so given to his guests as aforesaid had been paid for by one of them.

Mr. Porter moved the Court to dismiss the case on the ground that the law was unconstitutional. If imported liquor is not excepted from the operation of the statute, then we say the statute is void because it conflicts with the laws and treaties of the United States which authorize a sale. 1. If Congress has power to regulate a subject matter, a State can not interfere to oppose or impede such regulation. In such case, if a State law conflicts with the act of Congress, the State law must yield, because the Constitution says, that acts of Congress passed within the scope of the constitutional power of Congress are the supreme law of the land. 2. In *Brown v. Maryland*, the Supreme Court of the United States has decided that a State law conflicting with the free right of the importer to sell in the imported package was void, because it would render the imported article valueless. To forbid a sale by the person buying from the importer would render the property valueless and would equally prevent importation.

A State may regulate the sale of imported property and may tax it like other property after it has passed from the hands of the importer, but it has no power to prohibit a sale. It can not

grown by him, without having filed in the office of the clerk of the county, any undertaking approved by the county judge of the county, according to the provision of the second section of an act of the legislature of the State of New York, entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9, 1855; and the sale of which said intoxicating liquor, in the manner aforesaid, then and there not being authorized by any law or treaty of the United States; and no right then and there to sell the aforesaid intoxicating liquor then and there being given by any law or treaty of the United States; and contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

accomplish indirectly what it is forbidden to do directly. The license cases (5 How.) do not contravene this doctrine. Those were cases of regulation, not of prohibition. They were so treated by counsel in the argument. (5 How. R., 550, 551.) As to the New Hampshire case, it turned upon another point, viz., that Congress had never exercised its constitutional power to regulate commerce between the States, the liquor not being in that case imported, but brought into New Hampshire from Massachusetts. The expressions in the opinions of some of the judges, that States might even prohibit the sale of imported liquor, after it had passed to the hands of a purchaser from the importer, are *obiter* and were not called for by the facts of the case.

It will not be denied but this statute is prohibitory. It aims to prevent the use of intoxicating liquor as a beverage. It enforces absolute prohibition. The prohibitory act is void because it impairs the "obligations of contracts" contrary to an express inhibition in the Constitution of the United States. This provision of the Constitution is violated by an act affecting the tenure or title to property acquired under a contract, or interfering with the right to use and enjoy the property in any manner which was lawful at the time of acquiring title.

The legislature has the power to regulate, but not the power to destroy or to prohibit it. It is like the control the legislature has over the remedy which it may exercise, provided it is not carried so far as to trench upon an existing or vested right. Our license laws regulated but did not prohibit the sale. In quantities above five gallons there was no restriction.

The act is a violation of the provisions of the United States and State constitutions, which declare that "no person shall be deprived of life, liberty or property, without due process of law," and that "No member of this State shall be disfranchised or deprived of any of the rights and privileges secured to any citizen thereof unless by the law of the land or the judgment of his peers," and that no State shall pass any bill of attainder. It will not be denied but intoxicating liquors are property. "Spirits and distilled liquors are universally admitted to be the subjects of ownership and property, and are therefore subject of exchange, barter and traffic." (5 How., 577, Taney, C. J.) They are admitted to be property by the act itself, which treats them as legitimate subjects of ownership.

On the 3rd day of July, Landon was the owner of the property in question, enjoying all the rights incident to ownership. On the 4th day of July that same property was rendered valueless, by the fiat of the legislature, which deprived him of the power of sale. But the act goes farther. It leaves nothing to inference. By the twenty-fifth section, all liquor kept in violation of any provision of the act was declared to be a public nuisance. The property, with all its rights and incidents, it thus annihilated by legislative edict. On the third it had value and was protected by law. On the fourth its very existence became a crime. It had

ceased to be property. A more palpable deprivation of property cannot be conceived.

But it is said this is done by "due process of law." It is done without any process of law and by a mere legislative enactment. It is a gross usurpation by the legislature of judicial functions. The Prosecution admits that liquor is property, that the right to sell property is one of its recognized legal incidents, and that "due process of law" means a trial and judgment in regular judicial proceedings. But in claiming the right to regulate the sale of property, it overlooks the fact that the property here with all its rights and incidents was obliterated by a mere legislative act.

The words "law of the land" do not mean a statute passed for the purpose of working the wrong. They mean by due course of law; by indictment or presentment of good and lawful men. And "due course of law" means law in the regular course of administration through courts of justice. In South Carolina the words "laws of the land" in the State constitution have been decided to mean the common and statute law existing in that State at the adoption of its constitution. (*State v. Simmons*, 2 Speers 767.) The act in question has the most objectionable characteristics of a bill of attainder. It forfeits and confiscates the property of the citizen.

The object of the prohibitory act is absolute prohibition of the use of intoxicating liquor as a beverage. The whole scheme of the act is to adjudge liquor a nuisance. If that general scheme is unconstitutional and void, so are also all the means by which it is to be enforced. If any of the provisions necessary for accomplishing the object are invalid, the whole and every part of the act must fail. The legislature has no constitutional right to adjudge property to be a public nuisance, and thus to place it beyond the pale of ownership and protection. The legislature cannot deprive the citizen of that which the constitution says he shall have and enjoy. A public nuisance is that which is inconvenient or troublesome to the whole community in general, and not merely to some particular person. (4 Black. Com. 167.) It is indictable, but not actionable. Now liquor "kept" can not be a nuisance. It is harmless of itself, nay, it is useful and is conceded to be, for certain purposes, by the act in question. It is no reason for declaring it a nuisance that it may be abused. So may every article of food and even cold water itself. Whether an article is a nuisance is a judicial, not a legislative question, and it can only be ascertained "by due process of law." By a legislative sentence all liquor "kept" in violation of the act is condemned and ceases to be property. All the other provisions of the act are the means of enforcing this legislative judgment, and many of them, considered severally, are enacted in utter disregard of constitutional rights.

"Civil government is not entitled, in ordinary cases and as a general rule, to regulate the use of property in the hands of the owners, by sumptuary laws or any other visionary schemes of frugality and equality." (2 Kent Com. 329.) It is a universally

recognized theory of government that absolute and despotic sovereignty, which must exist somewhere in every organized political society, does, by our system, remain with the people, and that the legislative power, which has been conferred upon government, is only such portions of that absolute sovereign power as is necessary to accomplish the design and object of government, which is the security and protection of the persons and property of all the citizens. Under these universally reserved rights we are to be protected against all sumptuary laws and all interference with personal rights. It is not in the power of the legislature to say what we shall eat or drink or wear, or to adjudge an article of property recognized as valuable and useful from the earliest ages, the use of which has been sanctioned by Divine example, to be a nuisance and to make it criminal to keep, sell or give it away. The power of police regulation authorizes the destruction of what is in itself good, because a bad use may be made of it. The power of police regulation results from necessity, and is itself on the very verge of authority. This act goes far beyond it.

Mr. Werner. What was the state of the law before the act? The law of the State granted licenses to sell intoxicating liquors in small quantities; and it was supposed the United States laws granted the right to sell in large quantities. What was the mischief against which the former law did not provide? The general use, especially in public places, of ardent spirits as a beverage. What remedy has the legislature provided by this act to cure the defect? The abolition of licenses for the sale of ardent spirits, and the prohibition of the sale of intoxicating liquors as a beverage. What was the true reason for the remedy? The "intemperance, pauperism and crime," resulting from its use. The mischief, remedy and reason for the remedy are attached more strongly to imported liquors than home-made.

The selling of intoxicating liquors in this State, England and all civilized countries, has been for centuries the subject of penal legislation. Such prohibition does not deprive any person of his property within the meaning of the constitutional provision upon that subject. It is the mere exercise of the police power of the State, the most essential and valuable element of government. The end sought by it is expressed in the title, "the prevention of intemperance, pauperism and crime." In the language of Justice Woodbury: "It aims at a right object, and is calculated to promote it. It is adapted to no other, and no other sinister or improper view can therefore either with delicacy or truth be imputed to the legislature." The means—prohibition of the sale of intoxicating liquors for use as a beverage—being adapted to the accomplishment of the praiseworthy object expressed in the title of the act, and in nowise in conflict with any provision of the Constitution, this Court will not inquire whether such prohibition is the most prudent or most feasible that might be devised by statesmen to produce the result desired. Those considerations belong exclusively to the legislature. In the language of Chief Justice Marshall: "The

judicial department can listen only to the mandates of law, and can tread only that path which is marked out by duty."

Mr. Porter. "Legislative power" is granted to the legislature, "judicial power" to the courts. The one can not invade the province of the other. If the legislature adjudge a thing a nuisance, it exercises a judicial power, and the act is void. This would be so even if the thing were not, as it is in this case, harmless in itself and in its effects also, when properly used. Such a despotic and arbitrary exercise of judicial power would never be made in any court; and this case is the best illustration that can be furnished of the necessity for a strict construction of powers conferred. The term "legislative power" is to be construed strictly. It can not be enlarged by implication. It being a power revocable, and conferred for the benefit only of the grantors—a mere agency—it must be construed so as to protect the rights of the grantors, that being the sole object of the grant. The power must be so construed as to preserve, not to destroy. It is a principle at the foundation of our Government that man is endowed by his Creator with certain "inalienable rights." These rights can only be lost by "due process of law." They could not be taken away by the legislature, even if there were no restriction in the Constitution.

What is meant by "legislative power?" It does not, certainly, cover every possible legislative act; that would render the legislature omnipotent. But these words "legislative power" are to be construed so as to exclude the powers granted to other governmental agencies and also the inalienable rights I have mentioned. There can be no legislative power over an inalienable right. We can not delegate to another the power to alienate a right that is inalienable.

Under this principle it is, and under this only, that we are protected against the enactment of sumptuary laws. The legislature has not the power to regulate my hours or sleep, or my diet or dress. (2 Kent, 329.) These are personal, reserved, inalienable rights, not within the scope of the grant of "legislative power."

This case involves not only the right of the owner to sell his property, but also the right of another to purchase. The purchaser has as much right to complain as the vendor. As to the purchaser, as to every citizen who may desire to purchase, the act in question is a sumptuary law, and void. All citizens are prohibited purchasing the article for use as a beverage. Absolute prohibition as a beverage is conceded to be the object and effect of the act.

It is a sumptuary law, absolutely prohibiting the purchase for use as a drink, of what is not denied to be a wholesome and useful article, if properly used. It is thus an invasion by the legislature of the inalienable right of the citizen to judge for himself in relation to his own diet.

It is no answer to say, it may be abused. Its abuse may be punished, but the right to use property can not be taken away. As a violation of the right of the citizen, therefore, to purchase,

as well as of the owner to sell, the act is unauthorized and void. We concede the sale may be regulated as to time, manner, place, license, etc.; but it can not be absolutely prohibited, nor can the citizen be deprived of its proper use as a beverage.

JUDGE COLE ruled that in an inferior court like this the act of the legislature must be presumed to be constitutional. If what has been passed by the law-making body of the State is to be set aside that must be done by the Supreme Court, and not by any one of the hundreds of inferior magistrates throughout the State to whom complaints of breaches of the law are being daily made.

MR PORTER'S ARGUMENT TO THE JURY.

Mr. Porter—Gentlemen: The opinions expressed by one of your number in the presence of the Court, as well as the intimations from the bench, during the progress of the trial, admonish me that I am entering upon no ordinary task. Unless preconceived opinions can be removed by argument and authority, the defendant cannot expect the acquittal to which we believe him to be entitled.

The fact is undisputed, that on the 6th day of July, he sold two glasses of imported brandy to Messrs. Johnson and Hastings. Before he can be convicted, the question must be determined, either by you or by the Court, whether this act was a crime. This is an inferior tribunal, in which the jury are the judges both of the law and the fact. Two questions are involved in the issue: 1. Whether the sale of imported liquors is prohibited by the act; 2. Whether the prohibitory enactment is in conflict with the constitution. Both are legal questions; one involving the construction, and the other the validity of the law. In the argument of questions like these, against preconceived opinions, and without the aid of a judge accustomed to preside in superior tribunals, I cannot promise to be brief. My positions must be sustained by argument, and fortified by judicial decisions. Your known views as friends of the temperance cause, and your character for intelligence and integrity as citizens, are a sufficient guarantee that what-

ever may be your present views as to the law in question, you will give the defendant a candid hearing; and that after fairly weighing the arguments and authorities adduced for the prosecution and the defense, each juror will conform his verdict to the convictions of his conscience and understanding.

Before proceeding to the discussion of the main questions involved, you will pardon me for calling your attention to the circumstances attending this prosecution, the relation of the parties, and the magnitude of the interests affected by your decision; and I may then confidently invoke your unremitting attention, and your most careful consideration of the great principles of public law by which your verdict is to be controlled.

The advocates of the prohibitory law have chosen to make this the leading case. This city is the great rallying point of the friends of coercion. Here the law had its origin. Here is the stronghold of its great champions. The first blow was to be dealt at the Capital, and William Landon was to be the first victim struck down. Here the issue is to be decided upon the merits, by an Albany jury, and before an Albany court. Our adversaries selected the tribunal; and they did not choose that the Judges of a superior court should preside on the trial of the accused.

To Mr. Landon the case is of momentous importance. For the first time he is arraigned as a criminal. If you find him guilty, the nominal penalty is fine or imprisonment. But the actual penalty is the immediate forfeiture upon the rendition of your verdict, of \$6,000 worth of his property, not described in the complaint, not named in the warrant, in regard to which no issue has been joined, and no evidence adduced. These are the direct consequences. Indirectly, as I shall presently show, the final decision of this cause involves his entire fortune, and his liberty for life. He does not shrink from the issue. He asks only his legal rights, to be declared by impartial courts and juries, in the spirit of cold and rigid justice.

The course of the prosecution, hitherto, in the progress of these proceedings, has been a striking illustration of the prac-

tical working of this law. The learned and eloquent counsel who is to follow me in his argument, has been constrained by his client, by the necessities of the case, and his professional relations, to occupy inconsistent and antagonistic positions. In a prosecution for the enforcement of the law, the struggle has been to expunge the few provisions it contains, which could be invoked for the protection of the rights of the party accused.

The eleventh section provides that "the complaint shall state the facts and circumstances" on which the accuser founds his "belief" that a crime has been committed. The complaint in this case states neither facts nor circumstances, but mere rumors of facts. Thus, the counsel was compelled to claim, in the face of three decisions of the Supreme Court upon the precise question involved, that such a complaint was sufficient to give jurisdiction to the magistrate.

The act only authorizes an arrest upon a charge of crime. It does not profess to make the sale of all liquor unlawful, but expressly excepts a large class of sales from the operation of the prohibition. Neither the complaint, the affidavits, nor the warrant issued in this case, show any facts rendering the sale made by Landon unlawful. The counsel was compelled to claim that the defendant could be arraigned on a charge, not even alleging a single fact inconsistent with his entire innocence; and this in direct conflict with the decision made by the Supreme Court of Maine, the State to which the coercion bill traces its lineage.

The fifth and twentieth sections of the act invest the magistrate with all the powers of a justice in other cases of misdemeanor. One of these, as declared by the revised statutes, is to accept bail from the defendant for his appearance at the next criminal court, to answer any indictment which may be based on the accusation; thus securing him at his election, a trial in a court of record, by a jury of twelve of his peers. The counsel was compelled to resist the defendant's application, to deny his right to be held to bail, to make war on the revised statutes, and to insist that for some cause as yet unexplained, the act means the converse of what it declares.

The prohibitory law provides for trial by jury, and does not profess upon its face to restrict the number of jurors; but when the defendant claimed his right to a jury of twelve, the number guaranteed by the Constitution, according to the view of the Court of Appeals in the case reported in 2 Kernan, 198, the counsel was compelled to fall back on the provision of the revised statutes for trial by a jury of six, in cases of petty misdemeanor, if the defendant so elected in preference to giving bail; and to insist that under this law, the defendant should be tried by a jury of six against his election, though his whole fortune was involved. And now the counsel is compelled to contend that you are bound to convict the defendant for a sale of imported liquor, authorized by the very terms of the section on which the criminal charge is based. In short, the prosecution have been actively and zealously engaged in the double work of at once enforcing and repudiating the provisions of the law. They practically concur with George Wood, in construing it as an act for the destruction of property, and the owners of property. They assume this to be the intent of the law, and whatever provisions they find, looking to the saving of property, or the protection of legal rights, they regard as inconsistent with the intent, and fit only to be expunged.

The prosecution profess to have brought this accusation "for the purpose of testing" the construction and validity of the law. Both questions they concede to be involved in doubt. Yet, contrary to the universal rule of criminal jurisprudence, they insist that the prosecution, instead of the accused, should have the benefit of the doubt; and this, though the law has provided for an appeal by either party. The offense of selling liquor, being a crime more atrocious than mere treason or murder, the act provides that in these cases, unlike all others in the criminal catalogue, the complainant may appeal, even though the accused has been acquitted on the merits, by the verdict of a jury. The politicians who enacted this law concurred with the prosecution in the opinion, that being philanthropists, they were omnipotent like the parliament of Eng-

land, and brushing away by a legislative repeal, the provision of the Constitution, that "no person shall be subject to be twice put in jeopardy for the same offense," they give the complainant the right to test the questions of construction and validity, and all possible questions, by authorizing a reversal even upon a verdict of acquittal.

The prosecution, less tolerant than the legislature, though they admit the questions to be doubtful, insist upon a solution of their doubts, by the conviction of Mr. Landon and the confiscation of his property. They are aware that under the eighth section, the complainant can appeal without costs; the defendant only on payment of costs. The complainant can appeal without bail. The section was so framed in this respect, as to give it a color of fairness at war with the spirit of the act. But it is merely colorable. The contents of the bond are specified, and obligatory only on the defendant. In every other criminal case, the accused, if unable to give bail, can secure the right of appeal, by submitting to continued imprisonment. Under this act he cannot appeal from the decision, even by paying the costs and remaining in the penitentiary until the final decision by the court of review. He can only obtain an appeal, by giving bail and sureties for ten times the amount of the fine, conditioned among other things, that he will violate no provision of the law during the pendency of the appeal, and that he and his sureties will pay all fines, damages, and costs, which may be adjudged against him in other cases in the meantime; and in each successive suit, the same tenfold security is exacted as the condition to the right of review. And whether he keeps his liquor or sells it, he is equally guilty. He is subject in either case, to the forfeiture of his bond, and the hazard of a dismissal of his appeal. He must multiply his sureties to meet the multiplying penalties.

In the meantime, your verdict has placed him in a position in which he cannot help violating the law and breaking his bond, except by the instantaneous destruction of his property. His hotel is his dwelling, his property is there, if he waits till

your verdict is recorded, he is too late. His bond is broken at the instant of its execution. He keeps his property in his own house, but the law has entered and he is excluded; he may not protect it even under his own roof. He is a criminal if he sells it, a criminal if he lets it alone. It is on forbidden ground. To secure the right of appeal, he must avail himself of the brief interval between the announcement and the entry of your verdict, to rush to his dwelling and destroy his property, or he is precluded from an appeal. He is still amenable for the past, but he may thus guard against the future. By sacrificing \$6,000, and giving security for \$500 more, he secures the right to have the question adjudged, whether he was legally subjected to a \$50 fine for selling imported liquor under the express authority of the Prohibitory law. He has another alternative: the conversion of a costly and spacious hotel into a private dwelling, by the closing of his doors, the expulsion of his boarders, the exclusion of his guests, and the breaking up of the business in which he has invested the whole earnings of his life. By doing this before your verdict is recorded, paying the costs, and giving security for ten times the amount, he may secure the hearing of his appeal from a fifty dollar judgment.

And even then he does not save his property. The fourth section of the act provides that at the instant of his conviction all his liquor is forfeited. The appeal stays execution for the fine, but neither arrests nor revokes the forfeiture. He deems the conviction wrongful. He has not even violated the prohibition; and the act itself is in direct conflict with the constitution. Officer Whalen thinks otherwise; he, or some other police constable enters the house of Mr. Landon, demands his keys, and dooms his property to destruction. He has appealed from the judgment. But the law cannot wait, the constable cannot wait; they are satisfied with the opinion of the learned counsel, who holds that a defendant may be lawfully convicted under an unconstitutional law; that it does not become unconstitutional until the Judges make it so by their decision; that the same act may be constitutional in the

Court of Sessions and unconstitutional in all other courts; and that here all laws are to be respected and obeyed, except the constitution, the paramount and supreme law.

Mr. Landon, whose case is yet undecided, has two alternatives; peaceably to surrender his property to destruction, or defend it by the strong hand of violence to the death. If he embraces the first, he consents to his own ruin; if he adopts the last, his hands are imbrued in human blood, shed in defense of his property, and at the peril of his life. These are the alternatives presented by a law, framed by philanthropic politicians to extirpate crime, and promote the cause of peace and good will among men.

Your verdict having been followed by the destruction of his property, Mr. Landon goes on with the prosecution of his appeal. Suppose the superior tribunals decide that you erred in his conviction; that the sale of imported liquors, which you pronounce a crime, is authorized by the very act under which you condemn him; or that the law which you hold it a crime to disobey, was utterly void and binding upon no man. The judgment is reversed; but to whom is Landon to look for redress? He has the barren satisfaction of learning from the superior tribunals that he was unjustly convicted; that his business was wrongfully broken up, his property wrongfully destroyed; and that he must look for reparation to Justice Cole and Police Officer Whalen. But in the meantime, these officers, under their views of the law, may have incurred liabilities to the amount of hundreds of thousands of dollars. If John Jacob Astor were the magistrate, and Stephen Gerard the constable, Mr. Landon might have some reasonable prospect of ultimate redress. The law is framed on the philanthropic theory of executing judgment by confiscation, and then permitting the courts to inquire whether it was rightfully executed. And in a case where the prosecution concedes the law to be of doubtful construction and validity, in a case brought to satisfy the curiosity of the complainant and the Carson League, as to the solution of these questions, it is insisted that the jury alone are not at liberty to doubt; that to them and to

the Justice, the Constitution is a sealed book; that they are to convict of crime, without inquiry as to guilt. The defendant is to be irretrievably ruined, as the condition to the privilege of ascertaining whether he has been rightfully ruined; and this, in a case where the complainant can appeal without cost security, risk, or responsibility.

If he fails to appeal from a verdict of conviction, he is visited with swift and sure destruction. The police force of the city gather at his dwelling and execute the legislative judgment pronounced by the fourth section of the bill. Six thousand dollars' worth of property is destroyed in an hour; and the work is only begun. For each glass of liquor he has sold, he has already incurred a new penalty. The second conviction visits him with a fine of \$100 and thirty days in the penitentiary; each subsequent conviction with an equal fine and three month's imprisonment. If he is guilty in this case, he is guilty in all, and within the last fifteen days, has incurred fines exceeding the amount of his fortune thrice told. He is stripped to beggary by penalties for acts he has already committed, and hopelessly condemned to the penitentiary for life. And, if philanthropy shall at last become weary of destruction, repeal the law of violence, and throw open the prison doors, Mr. Landon will come forth a ruined and broken man, turned adrift on the world, excluded from the business in which his life has been spent, with no trade or profession, declining in years, without the strength to labor, a released criminal and a hopeless bankrupt. And all these penalties he incurs if he sells his property; all these he incurs if he lets it alone. He belongs to the class whom philanthropy has proscribed.

The counsel will tell you that the law looks only to the wrong, and not to the consequences. But, in determining whether an act is a crime, whether the law which denounces it as such is itself an invasion of private rights, and a crime against the Constitution, it is the duty of courts as well as juries, to look at consequences, and to test the validity of the enactment by its principles and results. Even the business

pursuits of men are protected from legislative interdicts, unless they are unlawful in their own nature, or the mode in which they are conducted. When the citizen is driven from his vocation without wrong, it is no slight deprivation. In the language of Chief Justice Ruffin, in the case reported in 4 Deveraux, he is deprived "of an employment, the immediate source of his livelihood, the preparation for which has been the great business, it may be of his life, to which he has served a long apprenticeship, and to which he has devoted himself, abandoning other lines of life which were once open to his free choice. True, he is free to work at other employments, but he is fit for none. He knows but this. He is in the situation of one bred to the agriculture of our country, to whom the legislature should say, 'Till the ground no more; go and spin silk or weave muslin.' His labor is not the subject of conscription; but he hangs a burden on himself, because the only employment to which he is competent is denied him." All these considerations the Carson League politicians repel with scouts and derision. They hail the dealers as venders of poison. They brand them as criminals who traffic in death. These men who have property in liquor should have foreseen the repeal of the Constitution, and forced their property upon the market, to save it from spoliation. They should have seen the approach of this engine of philanthropy, on which political aspirants were riding toward place and power, and should have fled from the track to escape swift and sure destruction. It is the language of place seekers and bigots, not of the courts and the Constitution.

When Williams made this complaint, he knew the conviction he sought would involve the utter ruin of a man who had never wronged him, and who was scarcely aware of his existence. He knew, but I am sure he could not have reflected upon the consequences, or he would have tendered to Mr. Landon, an opportunity upon an agreed case to submit these grave questions amicably for decision in the superior tribunals, without seeking to involve him in destruction at the very threshold of the case, and compelling him to sacrifice his property be-

fore the right could be decided. Yet this is the practical operation of the law. It invites prosecution. It makes it the duty of officers, and the right of every man to complain. It appeals to every passion of every class, to private hatred, to heated fanaticism, to partisan animosity, invites all to the turmoil of litigation, hounds on all to the work of common destruction. It permits the machinery of the criminal law to be put in motion by any man in the community, and if the court is right, on idle rumor, without knowing whether the accusation is true or false, heedless of the consequences, without costs, and without risk or responsibility.

In this case there were topics well worthy Williams' reflection before he set this machinery in motion. The law gives him the right to complain, but it gives him also the right not to complain. It permits him to choose the magistrate, the magistrate to choose the constable and the constable to choose the jury. In a prosecution to test the law, involving a grave criminal issue, and the confiscation of thousands of dollars, he rejects the alternative of an indictment before the Grand Jury and a trial in a court of record. He passes over the county judge, and selects a police justice. He passes over the district attorney and selects private counsel. He presses a conviction with unabated zeal, and devotes himself to the work of crushing by the form of law, one who to him was almost a stranger. Knowing Mr. Landon by reputation, he knew that he was in all respects at least as upright, as respectable, and as honorable a man as himself. He will probably concede that Mr. Landon is more generally known, and whether deservedly or otherwise, has the good fortune to command, even in a higher degree than himself, the confidence and respect of this community. It is a confidence and respect which Mr. Landon has earned by a manly and honorable life. He knew that the defendant, long before these bills of confiscation were invented, had invested his means, accumulated by years of industry, in property which this law proposes to confiscate, in a business which this act professes to make criminal. He knew that since its adoption, Mr. Landon had neither time nor op-

portunity to sell his property and qualify himself for embarking in a new pursuit in life. He knew that the act gave those whose means were invested in this business but two months to make sale of over a hundred millions of property, and that it glutted the market beyond the possibility of sale, at the same time that it discouraged purchasers, by menacing them with penalties, indictment and confiscation. He knew that the law, to say the least of it, was of doubtful construction, of extremely doubtful constitutionality; that in a less obnoxious form it had been arrested by an Executive veto; and that two eminent jurists who successively held the office of Chief Justice of the State, concurred with the ablest members of the American bar, in pronouncing it to be clearly and palpably unconstitutional. He knew that it was condemned by the almost unanimous opinions of both divisions of one of the great political parties of New York; that it was adopted against the known views of the most sagacious politicians, the most eminent journalists and the most enlightened statesmen of each of the political parties, that it was deprecated by great men and good men, and by a large class of the religious community, and of the strongest, the earliest, and most steadfast friends of temperance. He knew too, that the result of public discussion by jurists and civilians had produced so marked a change in the direction of public sentiment, that the great champions of the law, the Delavans, the McCoys and the Cornings, scorned to devote themselves to the work of its enforcement. Of our sixty thousand citizens no man else chose to become an informer.

Under these circumstances Chauncey P. Williams was ready to volunteer in the legal work of demolition and destruction. He could not wait for the public officer to act whom the law had charged with the duty of preferring accusations. In hot haste, before the law was three days old, he devoted himself to the great and noble work. The act had invited all to a feast of vengeance. Of our sixty thousand citizens one philanthopist alone seemed ready for the feast. All this is lawful and just, if the law is valid and just. I wish Mr. Williams had re-

flected more deliberately upon the nature of the work before him. A thousand Albanians are to be ruined by fines, penalties and confiscation; hundreds of families are to be reduced by law from independence to beggary. It is a hard thing to set deliberately, and in cold blood, at the ruin of one family, even with the law on one's side. Here are hundreds to be crushed. Let me suggest to those who hereafter, on more full reflection that Mr. Williams, shall present themselves as accusers, whether some things are not lawful which a humane man may yet forego; and without even losing the respect of those who are boiling over with philanthropy, and cannot rest in peace until these men are beggared. It is entirely lawful to hang a convicted homicide; but are there many who would seek to supplant the officer, and ask to be deputized to choke a live man to death? On the 3d of July the complainant and defendant were both men of large means, invested in their respective vocations of lumberman and hotel proprietor. If by the operation of this law it had been the complainant's instead of the defendant's property that was doomed to destruction, no man believes, who knows William Landon, that he would have volunteered as torch bearer, even with the law on his side, to fire Williams' lumber yard or turn his dwelling to ashes.

All this would be of little moment, except as it illustrates the spirit of this law, and shows the nature of the work in which you are invited to co-operate. Let the Carson League succeed here and now, and the rest of their work is easy. Give them the victory they ask, and the path is open before them. This is the pioneer prosecution. Your verdict will decide whether Albany jurors favor these accusations, and are ready to aid in the work of destruction; whether our courts are to be clogged day by day with excise suits, until the hotel keepers, the brewers, the distillers, and the wine merchants are beggared in succession, and driven out from among us; whether the ordinary administration of justice is to be suspended, until we have completed the destruction of two millions of property in our midst; whether the business men of Albany are

to be dragged day by day into the jury box for the year to come, to hear the complaints of the Carson League, and aid them in their philanthropic crusade against a class embracing many of our best, our oldest and most honored citizens.

In the general view I am presenting of the scheme of legislation embodied in this law, and the practical effect it was designed to accomplish, it becomes necessary to allude to other considerations of a more public character. They have an important bearing upon the rule of construction to be applied, and a still more direct connection with the constitutional inquiry. It is never to be presumed that it was the design of the legislature to inflict wanton injury upon large classes of citizens; and the language of statutes invading general rights is always to be restrained within the narrowest limits. And when a law is found to be subversive of the public interests at the same time it injures the security and value of private property, it weakens the presumption in favor of its constitutionality.

The Prohibitory Act took effect on the 4th of July. It then first spoke the language of command. It found fifty millions of property in the form of spirituous liquor, in the hands of private citizens, purchased on the faith of pre-existing laws and constitutional guarantees—property which had contributed to the taxes of the state and to the national revenues, and which was bought, kept and intended for sale as a beverage. According to the theory of the prosecution, all this the law was intended to confiscate, at a single blow and without compensation. It found a hundred thousand citizens of the State engaged in various branches of business dependent on this department of commerce. All those who would not acquiesce in the destruction of their property, it converted into criminals, and proposed to hunt down into the jails and penitentiaries. The legislature claimed for itself the omnipotence of Parliament, and assumed to impose upon three millions of men an act of arbitrary, bold and unlimited dominion. It undertook to strike down in one day the business and the property of a hundred thousand citizens, not as a punishment for antecedent

crime, but on the pretext of private philanthropy and public necessity. But this was not a tithe of the mischief it contemplated. Like all despotic enactments, it anticipated resistance, and provided for subduing it by a systematic departure from the usual course of public justice, and by lopping away, one by one, the safeguards of the citizen. It invested inferior magistrates with unlimited power over liberty and property. It created a host of constructive crimes, and visited them with unheard-of penalties and confiscations. It reversed the rules of evidence, and made acts in themselves lawful, presumptive evidence of crime. It deprived parties accused, in cases involving alike their fortunes and their liberty, of the right of trial by jury according to the course of the common law. It clogged the right of appeal from the decision of an inferior magistrate, with conditions unprecedented even in absolute monarchies. It provided that the accused might again be put in jeopardy after a full acquittal upon the merits. It usurped the province of the judiciary, and by a legislative decree confiscated fifty millions of property. It adjudged the guilt of tens of thousands of citizens, and substantially restricted the courts to the execution of a search warrant for the culprits.

But the immediate victims are not the only sufferers under the act. Like every similar blow, it jars the framework of society. The sense of wrong rouses the spirit of resistance. Dissension and discord arise, and divide men in their business, their private, and their social relations. Animosities are kindled which years will not quench. Rumor is made the basis of criminal accusation, and espionage receives the sanction of law. Secret societies are organized to conduct state prosecutions, and the accused are admonished that they must confederate to resist them. Foul imputations, invective and calumny are used by heated accusers as weapons of war. The weapons of assault may become, in their turn, the weapons of defense. Men do not willingly consent to be at once robbed and maligned. To ameliorate one evil a hundred are introduced, tending to demoralize society, and foster the spirit of private feud, and mutual enmity. Old ties are severed, old

rights impaired, old guarantees repealed. To reform here and there a straggling inebriate, constitutional rights are to be invaded, and a criminal code introduced which has no parallel even in the history of New England. And this, in a State where there is less intemperance than in any other in the Union, and where the proportion of inebriates is less than one man out of two hundred.

The law purports to have been enacted to prevent "intemperance, pauperism and crime." It does not propose to prevent intemperance by prohibiting the use and reclaiming the drunkard, but by changing the scene of indulgence from the hotel to the dwelling house, from the mart of business to the family fireside. It proposes to discourage it among the dealers by prohibiting them from selling, and tendering them the alternative, either to drink their liquor or to destroy it at their election. It proposes to prevent pauperism by reducing in an hour tens of thousands of families from independence to poverty. It proposes to diminish crime, by multiplying criminals, creating constructive offenses, presuming guilt instead of innocence, imprisoning your officers, decimating your population, and enlarging your penitentiaries.

Other considerations invite your attention. The interests of those connected with this branch of commerce are interwoven with the other business interests of our citizens at large. New York is the greatest commercial State of the Union. Here the avenues of commerce converge. The States of New England live comparatively within themselves. They dig their wealth from the rocks. They bring it home from the ocean. They depend on their own resources. But when New York enacts restrictive laws, she not only crushes her own citizens, but cripples her commerce, and cuts off the tributaries of her wealth.

It is not true that the use of intoxicating liquor as a beverage, bears more than the merest fractional proportion to the amount sold at home and abroad, to those who use it as a beverage without using it to excess. As an illustration of this fact, I have taken the pains to obtain from intelligent business

men, an approximate estimate of the annual amount of this branch of commerce, in the city of Albany alone, and I am assured by those who are competent to judge, that the estimates are below the actual extent of the business:

Annual amount of grain trade, in rye, corn, and barley, for breweries and distilleries.....	\$6,000,000.00
Brewery business.....	2,500,000.00
Malting business.....	2,000,000.00
Distillery business and domestic liquor.....	1,500,000.00
Sales by merchants and others than manufacturers...	2,500,000.00
Coopers' business in this department.....	500,000.00
Sales of staves, forwarding, carting, etc.....	500,000.00
	<hr/>
	\$15,500,000.00

These, it is true, are gross proceeds; but a law which withdraws fifteen millions from the annual commerce of a single city, and ruins two thousand of its citizens, is well worthy of scrutiny; and especially when we consider the mode in which their destruction is effected.

Let me take as an illustration the case of John Taylor. He is an old and honored citizen; for sixty years he has lived in our midst; he has corrupted no man—wronged no man. Upright and honorable in all the relations of life, never withholding his aid where the public interest was to be advanced, never turning a deaf ear to the voice of private distress, he is one of the last men we should expect to hear denounced as a law-breaker and criminal. When he retired to rest on the night of the third of July, he had \$100,000 worth of property in his brewery, lawfully acquired and intended for sale. While he slept, the clock struck 12. The law came upon him like a thief in the night; and when he awoke at sunrise his property was confiscated and he was a criminal. Everything remained in the same condition as at nightfall. He had done nothing—said nothing; he had not harbored a guilty thought. The law's vengeance fell upon him in his sleep, and from that time to this it has been piling up its penalties to sink him on the day of Maine Law retribution. How many men that night went to sleep in affluence to wake the next morning bankrupts and criminals. I need not allude to the incidental operation

of this strange law. How much it will depreciate the value of our property, how much it will embarrass the collection of debts; how much disaster it will entail on the families of employes; what avenues of employment shall be opened to the destitute; all these are queries which it is not your province to answer.

If the law can be upheld, we shall have business enough in convicting the criminals. More than half our citizens are implicated in its penalties. If the theory of the prosecution is right, every sale is a misdemeanor, unless made by the licensee. To every sale there are at least two parties, and both are criminal. Under the general law every person who aids, advises, procures or participates in the commission of a misdemeanor, is indictable as a principal offender, and is subjected to the same rigid penalties of the law. If Landon is guilty, every man who has taken a glass of wine at a hotel or restaurant since the third of July, has subjected himself to a fine of \$50, and for each repetition of the offense, to a double fine, a criminal indictment and confinement in the penitentiary; though if he had taken the same glass in his own dwelling, this law would have held him innocent. If Landon is guilty, Messrs. Taylor, McKnight, Kirk, Mitchell, Britton and others whose characters are equally above reproach, have committed more crimes within fifteen days, than the greatest rogue in English history in the whole course of his career, and have incurred penalties enough already to sink a Norman barony. If Landon is guilty, you must replace your public officers. Each sheriff, deputy sheriff, constable, marshal or policeman is bound, under the twelfth section, to arrest every party he shall see engaged in violating the prohibition, to seize all liquors kept in breach of the act, to make complaint on oath against the offender, and to arrest every citizen who is publicly intoxicated; and the mere neglect to perform either of these duties is made a crime by the twentieth section, punishable with a fine of \$500, and a year in the penitentiary. If Landon is guilty, there are not three of these officers in the city of Albany, who have not already incurred penalties beyond the

amount of their salaries for the next half century, even if they could be relieved by executive clemency from imprisonment for life. They think justly of this act, and will be sustained by the public judgment and the decisions of the courts. No man is bound to obey an unconstitutional law. Its provisions are so utterly at war with the constitution, that men revolt at its enforcement.

And this is one of the great mischiefs of this species of legislation. When the law-givers undertake to pronounce fifty millions of property to be a public nuisance, and thus give a pretext and a license to the liberated thief, and the lawless plunderer, to join in the work of abatement and destruction, without warrant, or even when they license an irresponsible officer, to seize from the citizen by violence, the earnings of a life-time, they invite men to resistance, and tempt them to shed blood. Wise men will refrain from violence, but all are not wise. No one by my advice will resist the act by force. I trust no one by any man's advice, will oppose it by the strong hand. But we know that the ignorant and weak, here, are subject to the same temptations that beset Neal Dow, the homicide. You cannot reason with those who feel that they are wronged, and that they are defending their own against violence and fraud, under the forms of law. You have nothing to do with the mere question of expediency. The wisdom or folly of the law do not affect its validity. If it is constitutional, you are bound to enforce it, no matter how its unprecedented provisions may cleave down your citizens, and strike at public peace and prosperity. But when its construction is doubtful, these considerations are appropriate, and especially are they important in view of the comparison which we shall presently institute, between the provisions of the act and the mandates of the constitution.

But you have been told that in this court we are not entitled to a decision, either by the court or the jury, on the constitutionality of the act, and that even on the question of construction you are not the judges of the law, but are simply to find whether Landon sold liquor on the sixth of July, and if you

find that he did, to pronounce him guilty. The proposition that in any tribunal, a party accused can be convicted without being entitled to a decision, either by the court or the jury, on the question whether the facts charged constitute a crime, is utterly at war as well with principle as authority. The proposition, that in a Court of Special Sessions, where there is no power to render a special verdict, and no judge who is bound to expound the law, the jury are to pass only upon the fact, is directly in conflict with all the decisions. The proposition is bald of authority, unsound in principle, and opposed to the uniform usage in these inferior tribunals. You are to decide whether the defendant has been guilty of a crime. This involves two questions: 1. Is the act charged and proved a violation of law? If not, he is entitled to a verdict of not guilty. 2. Is the law he is charged with violating, valid or void? If void, he is entitled to an acquittal. In a free government, it is no crime to disobey an unconstitutional law. It is no man's duty, it is no man's right to subvert the constitution. It is the duty of every citizen, in office, and out of office, on the bench or in the jury box, to maintain and uphold it. The rule has been settled by too many decisions to be open for discussion. In the language of Judge McLean, in the case of *Ostrom v. Hammond*: "An unconstitutional law can afford a justification to no one." It binds neither state officer nor citizen, juror nor judge. Valid laws we are bound to obey; but our paramount obligation is to uphold the constitution, and every law is void which conflicts with its provisions.

And here we make our first stand against the provisions of this law. It attempts to deprive the accused of his right to be tried at his election, by a jury of twelve men, according to the course of the common law. While it arraigns the defendant for crime, and visits him at once with imprisonment, penalties and confiscation, it seeks, as this court construes it, to deprive him of his right to give bail to answer to an indictment before a court of superior jurisdiction. It wrenches from him the privilege of trial before learned and able judges, accustomed to deal with constitutional questions, and to move in the higher

departments of criminal jurisprudence. It deprives you and us of their aid in giving authoritative expositions of the law. It hands each defendant over to any justice of the peace the complainant may choose to select. It leaves the accused to lean upon the jury for a safe deliverance, as well upon the law as the fact, and on you we are content to lean. But while we do so, we cannot but deplore the fact, that the complainant was not willing to prefer his complaint before a superior tribunal. We see how judges accustomed to such questions deal with them on the bench. You are detained here to try the question whether Mr. Landon was guilty of a crime in selling imported liquor, when it has been already decided by the learned Recorder of New York, chosen to administer criminal justice for more than half a million of men, that the sale of such liquor is free to every citizen by the express terms of the very law the defendant is charged with violating. During the progress of this trial the same opinion was announced from the bench of the Supreme Court by Judges Brown and Strong, on the recent argument of the Poughkeepsie *certiorari*. It is not the fault of Mr. Justice Cole that he erred in his decision upon this question, but it is none the less the misfortune of the defendant that he is compelled to throw himself upon you for a safe deliverance. You have here a practical illustration of the operation of a law which seeks to deprive a party of the right, in a case involving his character and fortune, to secure to himself by giving bail, a trial in a court of record, according to the course of the common law.

But the general law, discriminating between these inferior courts, and those superior tribunals in which learned jurists preside, guards the rights of the accused by giving you ampler powers, and imposing upon you a more grave responsibility. In civil causes, in the courts above, the judges pass upon the law, and the jury only upon the facts. Some few cases have gone so far as to hold that in those courts, even in criminal cases, the jury are not at liberty to find upon questions of law against the opinion of the court. But these decisions are restricted to trials in courts of record, where the jury are at

liberty to find a special verdict, and to leave with the Court the responsibility of applying the law to the finding. An immense majority of the cases maintain the right of the jury even there, to pass upon the law as well as the fact on all trials for crime. That is a question I do not propose to discuss, and on which it is unnecessary to express an opinion. In the memorable case of *The People v. Croswell*, the prerogative of the jury in all other criminal cases was conceded, but the court were divided in opinion on the question whether there was not an exception to the rule on trials for libel. To use the language of Chief Justice Kent (3 John. Cases, Shepard's ed., 365), "In every criminal case upon the plea of not guilty, the jury may, and indeed they must, unless they choose to find a special verdict, take upon themselves the decision of the law as well as the fact, and bring in a verdict as comprehensive as the issue; because in every such case they are charged with the deliverance of the defendant from the crime of which he is accused." The argument of Gen. Hamilton against the encroachment upon the province of the jury in cases of libel, was so conclusive, that at the next session of the legislature an act was passed, declaring the right of the jury in cases of libel, to determine the law and the fact, "in like manner as in other criminal cases." (Sess. Laws of 1805, 232.) This law, though its phraseology has been modified, has never been repealed. Down to the time of the adoption of the present Constitution, I am unable to find that the right was ever abridged by any judicial decision. The rule as it then existed, seems to have been clamped with iron by the provisions in the Constitution, protecting the substance no less than the form of the right of trial by jury. "The trial by jury, in all cases which it has heretofore been used, shall remain inviolate forever." (Const. Art. 1, Sec. 2.) The right of the jury to pass upon the law in courts of record, in cases of crime, has since been questioned in two or three cases in this State, on the ground that it was guaranteed in terms in cases of libel, by another provision of the Constitution. In these cases it was guaranteed, because in these only had it been invaded. In these

alone had the previous usage been different in different courts. All other cases were provided for by the section I have read, the usage in respect to them, having been uniform since the foundation of the government. In neither of the cases in which this question has arisen, was the attention of the court called to the provision I have cited from the first article of the constitution. (Various cases were cited by counsel, bearing upon this question, decided by the courts of this and other States.) The counsel for the defendant refers me to three cases. Of these, two arose in Massachusetts, and one in New York. The cases in Massachusetts are inapplicable, being governed by other usages, and different constitutional provisions. The case referred in this State, arose before Judge Barculo, at a Court of Oyer and Terminer. Each of us might have cited other conflicting decisions, as to the rule applicable to jurors in courts of record. But as to the rule in these inferior courts, all the cases are in harmony.

Even in civil cases, in Courts held by Justices of the Peace, the right is settled and undisputed. "The jury may decide both the law and the facts." (3 Johns. 436.) There is no reason why questions of law should be withdrawn from the jury, "when it is considered generally that Justices cannot be much acquainted with the science of the law." (3 N. Y. 141.) It is not assumed that as an ordinary rule they can give much aid to the jury. If they choose to deliver a charge, and err, the judgment is reversed. They are at liberty to advise the jury or not at their election, but the final decision is the sole province of the jury.

When criminal cases arise in courts of special sessions, the rule is uniform. It is perhaps nowhere better stated than in the case of *Chamberlain v. Brown*: "The jury are the judges both of the law and the facts in all courts of special and limited jurisdiction, and whose proceedings are regulated by the statute, and are not according to the course of the common law."

JUSTICE COLE. The rule is well settled that in Courts of Special Sessions, the jury are the judges of the law and the

fact; but the question here is, are they judges of the Constitution? I do not suppose that in these inferior tribunals, either the court or the jury are to judge whether the law is constitutional.

Mr. Porter. It is conceded that the jury are the judges of the law. Is not the Constitution the supreme law? It is the law of the people proclaimed by themselves, declaring their rights, in their own language, speaking plain words which no man can mistake. In the language of one of the authorities cited by my learned adversary: "Fundamental maxims of law and government are so plain and intuitive that everybody understands them." Yet it is seriously claimed, that you, who are made judges of the law, are not competent to understand the declaration of your own rights in the paramount law. As well might it be claimed that you are unable to comprehend the Declaration of Independence. You are told that you must convict a citizen of a crime, in obedience to the mandate of a statute, and in violation of the mandate of the constitution. I admit that if the superior courts had decided that the act was constitutional, you would be bound by their decision; for the judiciary is the ultimate arbiter as to the validity of all laws. But other courts have not decided it. The question meets you here, and must be determined either by you or by the Court, before the defendant can be convicted. None but the judiciary can convict. The counsel seems to suppose that neither the magistrate nor you form a part of the judiciary. But the judiciary is here. The power to convict, involves the power to acquit.

You are to decide whether these facts constitute a crime, and in the absence of authority to decide according to your honest convictions. You are to administer the law, and this embraces the supreme law. If this court and jury are the judiciary for the purpose of conviction, they are equally so for the purpose of acquittal. Chief Justice Shaw, in the case cited by the counsel for the prosecution (10 Metcalf, 282), holds that in every charge of crime, the question must be decided whether there is such a rule of law as that on which in-

dietment is found ; whether the acts charged amount to a violation of law and constitute the offense charged ; and that the decision of these questions is involved in the verdict of guilty or not guilty. The counsel concedes that these questions are to be decided, and yet holds that neither you nor the Court have the power to decide them. Yet, if a superior tribunal holds the law to be unconstitutional, your verdict will be set aside and the judgment reversed, on the express ground that you erred in deciding the law to be constitutional. It is said that if you hold the law to be invalid you violate your oaths. When did you swear to uphold a statute in violation of the constitution, to conform your verdict to the opinion of a justice of the peace, or to find a man guilty against your clear convictions ? When were you sworn to convict one of crime whom you believe to be innocent, and condemn him as a criminal, for disobeying a law which is binding on no man, and has no rightful place in the statute book ? Such is not the language of a juror's oath. If in the absence of decisions, you arrive at the clear conviction that this law is utterly void, you cannot convict Landon as a criminal for not obeying it.

In the language of the Supreme Court, in the case of *Ely v. Thompson*, 3 Marsh. 76, the Constitution "is an instrument that every officer of Government is bound to know and preserve at his peril, whether his office be judicial or ministerial ; and he cannot justify an act against its provisions, even with the authority of the legislature to aid him." In the still more emphatic language of Judge Brown, applied to the prohibitory law during the present week, at the general term in the second district, "In this case the whole proceedings are assailed on the ground that the legislature has no power to pass such a law ; and if they had not, then the proceedings in the court had no efficacy whatever. It strikes at the very root of the whole proceedings, because the legislature is limited in its power ; and if they choose to transcend that power, it is just as if any other person took upon them to enact laws." Suppose this prohibitory bill to have been enacted by Chauncey P. Williams and his associates in Carson League con-

vened (and they had just as much right as the New York Legislature to repeal the Constitution), and suppose the magistrate to issue his warrant for the prisoner, and his venire for you; the trial proceeds and the act of the Carson League is produced as your authority for the conviction of the prisoner; according to Judge Brown, you are bound to inquire whether the act has the force of a binding law before you convict the accused; but according to the theory of my learned friend, you have nothing to do with that grave inquiry, but law or no law must adjudge the accused to be a criminal. Not so the learned judges whose authority I shall invoke when we come to the discussion of the constitutional question. They entertained other views of the rights of the citizen and the duties of courts and jurors.

Has Mr. Landon ever violated this law? For the purpose of the argument upon this branch of the case, let us assume it to be constitutional. The liquor sold by the defendant was imported from France. It had contributed to the public revenue. It was liquor, the right to sell which in this State, is given by the laws of the United States. My friend thinks otherwise, but he will yield his judgment to the decision of the Federal courts, in which for eight years the whole country has acquiesced. The burden is upon the prosecution, to show that the defendant has committed a crime. The only prohibitory provision is contained in the first section of the bill. The sale of imported liquor is prohibited there or nowhere. But the last clause of the first section is in these words: "This section shall not apply to liquor the right to sell which in this State, is given by any law or treaty of the United States." The Supreme Court say that the right to sell imported liquor is given by those laws. The section would have been more brief, but not more explicit, if it had declared in terms, "This section shall not apply to any liquor imported from a foreign country." The prohibition does not apply to the liquor sold by Mr. Landon, and yet you are asked to convict him of violating the prohibition. The mere statement of the question puts an end to debate. Will my friend favor me by referring to any other prohibitory section? Will he favor me by stat-

ing the ground on which he claims that you shall extend the prohibition to imported liquor, when the legislature have declared that it shall not be so extended.

Mr. Werner. I rely on the decision in 5 How. 575, that the importer has a right to sell in the original package; but when it passes from the hands of the importer, it becomes subject to State laws and the right of State exclusion.

Mr. Porter. Then we have reached a point of contact. It may be sold under the United States laws. But after the first sale, after the package is broken, it becomes subject to the State laws and regulations, not to State prohibition. Landon's liquor was subject to the State laws. The State legislated and declared it free. It is under the State law that we claim the right of Landon to sell. The gentleman claims that the State could prohibit. On this we join issue. But we both agree that the State could refrain from prohibition. It has chosen to refrain. The legislature declare that the prohibition shall not apply to imported liquor. The language is broad and comprehensive. It is not restricted to packages open or packages broken, to liquor in bottles or casks, in the hands of the citizen or the importer, the buyer or seller; all is free. The intent is not left to conjecture. It is expressed in language. These lawgivers were not such bunglers that they could not express their meaning in words. In the 22nd section, when they meant to speak of "original packages" they called them such. In every view the reference was unnecessary. It was made from over caution, on the absurd theory that the law might be construed by judges as prohibiting sales by importers, and thus be overrode by the laws of the United States. It enjoined the Courts not to give the law a construction, which no man on earth would dream of adopting. Like other sections, it does no good, and unlike others, it does no harm. If it seems absurd, it will be remembered that it is probably a shred of the original bill as submitted by the Carson League, and can hardly be expected to match exactly with the subsequent patch work of politicians. The 22nd section prohibits nothing. The 1st section authorizes the sale of imported liquors. It makes the act lawful which is here

charged as criminal. If the prosecution is right, the law was framed under false pretenses, to entrap men into crime and ruin them by its penalties. It is a penal statute, and must be construed strictly in favor of the citizen.

We are told that sweeping destruction was the intent of the legislature, and that the construction should be in harmony with the intent. If we were to discard the language, and grope through the mazes of that political labyrinth in quest of the intent, we should witness strange scenes. I should like to cross-examine some of these excellent lawgivers in aid of your researches. The absurdity of the theory of the prosecution consists in the assumption that there was any common intent. Some intended to be honest and some to cheat. Some were sincere reformers who believed that they were higher than the Constitution, and that it was just to confiscate fifty millions of property, to compel inebriates to do their drinking at home in their families. Some intended to read the bill before the final vote, but never had the opportunity. Some had the opportunity who never had the inclination. Some were aspirants for votes, and intended to rise. Some had already risen who feared they might fall. Some intended to benefit the inebriate, some to benefit their party, some to benefit themselves. There was a rising political organization which was creating commotion and aspiring to power. Some intended to introduce an element of discord, and distract by new issues those who were too closely united. The Maine Law was adrift, and politicians wanted to anchor it, and fix the balance of power. The orgies at the legislative feast on Blackwell's Island, in the judgment of the Tribune, placed the intent of some beyond the confines of conjecture. Some intended prohibition and destruction; others intended a hollow form. Some intended to be sober and keep their constituents sober; some intended to drink and let their constituents drink. The politicians were sharper than the philanthropists and finally made a compromise. They voted for fierce prohibition, with the two memorable saving clauses—imported champagne for themselves, and domestic cider for their constituents. No man without spiritual communications, unless like Judge

Conklin, fresh from Mexico, or like Judge Savage, exhumed from a repose of a quarter of a century, would dream of imputing a common intent to this legislative medley of philanthropic politicians. These men, like others, must be judged by their works; and the first of these was to make imported liquors free. They had not yet acquired, like some of the Carson League, such an intense love for drunkards as to hate other men, and unite in the work of indiscriminate destruction.

That the intent expressed by the first section is to exempt foreign liquors from the operation of prohibition, no man denies. But I am relieved from discussion by judicial decisions. (*Mr. Porter* here read and commented upon the opinion of Recorder Smith, of New York, deciding that the sale of imported liquors was no violation of the first section of the act.) On the argument of the Poughkeepsie case before the Supreme Court of the second district, the question was incidentally presented, and in the stenographic report of the Herald of the 18th inst., I find the opinions expressed by the Judge to counsel on the argument:

Judge Strong. "The law of the United States authorizes the sale of imported brandy." "I do not think that by the exception in this law, the penalty exists where the liquor is imported."

Judge Brown. "It is so plain that he who runs may read."

(*Mr. Porter* also cited the opinions of Mr. Girard, Mr. Wood, Chief Justice Bronson and Chief Justice Beardsley, all concurring in the conclusion that the sale of imported liquors under the prohibitory law is free.)

But on this subject I have said enough. I may have failed in argument, but I have not failed in authority. If the case rested on the mere words of the act, it is free even from doubt. The language is plain, explicit and unambiguous. The very law the gentleman invokes, interposes between him and the defendant. Before he can reach Landon, he must beat down the legislature, and then unite with them in battering down the Constitution.

In approaching what I regard as the great question in this cause, permit me to allude to the nature of this species of legislation, and the plan of reform it proposes to engraft

on our system of government policy. Hitherto the cause of temperance has been steadily advancing. The legislature has confined itself within its appropriate sphere, and has been content to regulate the business it now proposes to destroy.

There have been for many centuries two classes of reformers in the respective departments of religion, morality and political economy. One class have relied on moral influences on all questions of mere morality and religious faith. They hold that errors of doctrine and practice, immorality and vice, should be corrected by moral influences, and that the law of violence should be confined to the prevention and punishment of known and acknowledged crimes. The other class have relied on the law of the strong. Under every form of government they seek to be leagued with power. Their religion is the true religion, their morality the true morality, and all who differ from them they hold to be fit subjects for armed coercion. Honest in their own convictions, they tolerate no dissent. The idea is not new. It has crept in under all governments, raged for a season, and died out from exhaustion.

The theory has been that men are at liberty to do evil that good may come, and that all means are sanctified by philanthropic ends. It is a theory which has often been tested and always failed. Even total abstinence is less momentous than religion. The one concerns mainly our physical condition. The other affects the highest happiness of man, and reaches forward to his welfare beyond the confines of life. This class of reformers, as they have been impatient of the slow progress of temperance, have been equally impatient as to the progress of religion. In many periods and many lands they have attempted to accelerate its progress by the law of violence and force. They visited heretics with fines, imprisonment and confiscations. Some they drove from their country, some they robbed of their goods, some they broke on the wheel, some they burned at the slow fire. But the experiments all failed. For eighteen centuries the religion of the cross has kept steadily on its way, refusing to be arrested by persecu-

tion, refusing to be hurried by force. And yet from time to time, force rises to renew the struggle, fights on with intolerant zeal, wearies itself with its own efforts, and relapses again to repose.

The advocates of this system have at length taken temperance by the hand. The old theory is to be tested on a new subject. The world is to be reformed by law. The doctrine of moral agency they reject. They propose to abolish temptation. They think Providence was mistaken in permitting good and evil to grow together in the garden. They regret that Maine Law Legislatures were not yet invented. They would have passed a confiscation bill. Officer Whalen would have gone to the garden, armed with his axe, and his warrant from Justice Cole. He would have cut down that tree, and we should all have been in Paradise.

There are other reformers who believe that man was intended as a free agent, and that moral means were those designed by Providence for the attainment of moral ends. They believe that the legislature will not prove better friends of the cause of morality and religion than the press, the church and the pulpit. They verily believe that temperance and Christianity may still prevail on earth, even though politicians and policemen should fail to take them by the hand. They believe that the great mistake of the times is too much legislation, and that in the general scramble for plunder, popularity and place, the laws are made stepping stones to mere personal ends and partisan advancement; that the rights of minorities are too little respected, and the power of majorities too recklessly abused.

This law is one of a series of encroachments. The freemen of New York are not accustomed to walk in strait-jackets. Intemperance is a great evil, but not greater than wholesale pillage and robbery, even in the form of law. Theft is a great evil, but not greater than the destruction of all property. Let us look a little at the theory on which this act is framed, the pretexts of its friends, and the scheme of reform it proposes.

The defenders of the law assume that the use of wine and other intoxicating liquor, and its sale for use as a beverage,

is not merely injurious and immoral, but criminal. It may well be that these reformers are right; and that not merely the abuse but the use of wine is a crime. It is a crime, however, which Messrs. Littlejohn and Leigh, in their legislative capacity, kindly consented to tolerate for sacramental purposes, in deference to the public example and injunction of the Redeemer of mankind. For the present they yield so far to the prejudices of the Christian world, as to permit them to buy wine and drink it, as a religious rite in commemoration of their Master's death, and in obedience to his command: "This do in remembrance of me."

These gentlemen tell us that all wines are poison, and are therefore rightfully declared a nuisance. They proclaim wine to be poison, those who buy it to be buyers of poison, those who sell it to be sellers of poison, those who drink it to be consumers of poison. But they kindly consider that prior to that memorable supper on the eve of the crucifixion, Delavan's plates of the Human Stomach had not yet been published. Carson had not yet circulated the hat for subscriptions to his League. Officer Whalen had not yet united with the order of the Good Templars. Dr. Staats had not yet proclaimed that those who dealt in intoxicating liquor dealt in death. The politicians of New York, in legislature convened, had not yet remodeled the decalogue, and introduced the new commandment, thou shalt not sell, nor buy, nor keep, nor give, nor drink the wine that is crushed from the fruit of the vine.

They admit that Christ had probably read and known of those warnings they are so fond of citing from the Old Testament against the abuse of intoxicating liquors, and they excuse him for his error in supposing them to have been aimed not at the use but at the abuse of wine. They forgive a descended God whom they have not yet enlightened, for putting the wine cup to his disciples' lips, and commending it to his followers in all successive generations, by his precept and example. As yet, they tolerate the believers in his name, in obeying his injunction and imitating his example, on four Sabbaths in the year, without consigning them to the penitentiary as rogues and criminals.

They forgive the apostles for commending temperance as a Christian virtue. Inspiration has not taught them that a man had no more right to give wine to his neighbor than to steal his purse or thrust a knife into his bosom; that instead of moderation in the use of wine being worthy of commendation, even total abstinence was merely refraining from crime, and was no more a Christian virtue than abstinence from theft, than abstinence from murder.

But while this law is framed upon the theory that those who deal in intoxicating liquor as a beverage, deal in crime and in death, it gives its sanction to the very traffic it condemns, in respect to two classes of intoxicating liquor. The lawgivers, some of whom, though voting for the law, had respect for the infirmities of their weaker brethren, in the first section of the act exempt all imported liquors from the operation of its provisions. These are relieved from the prohibition, without respect to time, place, or circumstances. All men may keep and sell them, whenever they please, in whatever place, in whatever quantity. As to all such liquors, they have made the traffic free.

They have also by the 22nd section of the Act, provided for the free sale of domestic cider, in quantities exceeding ten gallons, with a proviso that it shall not be drank on the premises of the seller. The sale of foreign liquors, in whatever quantities, is free. The sale of cider is free, providing it be sold in quantities sufficient to make forty men drunk, or to keep one man drunk for forty successive days.

All men are authorized to deal in "intemperance, pauperism, and crime," if they will import it from France or manufacture it at home. They go forth hand in hand: the legislative prohibition and the legislative indulgence. The orchard and the vineyard stand side by side. The lawgivers of New York, find both laden with fruit, ripening for the harvest of "intemperance, pauperism and crime." They issue their mandate. The one shall be taken and the other left. The owner is forbidden with the one and commissioned with the other, to go forth and make men drunkards, make them paupers, make them criminals. The intoxicating liquor pro-

duced by the one is property, protected by law. The intoxicating liquor produced by the other is a nuisance, unprotected by law, which courts may confiscate, and thieves steal, and violence destroy, without wrong and without redress.

According to the theory of this act, all intoxicating liquor is poison; maddening to crime; pregnant with death. The citizen may buy it or sell it, if it be the juice of the apple. He may neither buy it nor sell it if it be the juice of the grape. On one side is the tree, on the other the vine. Between them runs the line of demarcation, dividing innocence from guilt. In the judgment of the Carson League and the Maine Law politicians of New York, the Savior of mankind could have been vindicated, if, on that memorable night before the Crucifixion, when he put the wine cup to his own lips and the lips of his disciples, it had been filled with the juice of the apple instead of the juice of the grape; or if the wine it contained instead of being pressed from the pulp of the vineyards of Judea, had been imported from the hills of France or the valley of the Rhine. They would have thought better of his declaration on the eve of death, if he had conformed to their Maine Law views, when he used that memorable language: "I will not drink henceforth of the fruit of the vine, until that day when I drink it new with you in my Father's kingdom."

The law, as I have said, assumes all intoxicating liquor to be so destructive, that its use as a beverage, in any degree, is criminal; and consequently that its sale for use as a beverage, is in all cases criminal. This is the only pretext advanced, for the destruction without compensation, of over fifty millions of property in the hands of private citizens. On no other pretext can this act of general confiscation be for one moment defended as constitutional. Yet the act upon its face repudiates the very theory on which its validity must depend. The sale of wine, for use, is innocent, unless its use as a beverage is criminal. The mischief is conceded to arise only from its use, and the sale is objectionable only as incidental and tributary to the use. But this law sanctions the use of liquor as a beverage, while it prohibits the sale. And while it prohibits

the sale of some kinds of intoxicating liquors, it authorizes the sale of others as a beverage.

Let us refer for a moment to the provisions of the first section. Liquor kept in a dwelling house, though daily used, and intended for daily use, is protected; but if there be a boarder in the dwelling, the house is subject to search, and all the liquor it contains, to seizure and confiscation. The owner of the dwelling is subjected to penalties, indictment and confiscation, not because he keeps liquor and uses it, and gives it to his friends, for that is innocent, but because he has received a boarder who neither keeps or uses it, for that is criminal. If a gentleman boards at Mrs. Wood's, and offers his guest a glass of wine, he is criminal; if he is rich enough to dwell in a house of his own, and does the same act, he is innocent. If a widow, at the request of a sick boarder, give him a glass of wine, she is criminal; for women are not physicians, and are not within the saving clause of the act. If a boarder, in his private room at the Delavan House, drinks liquor, he is a criminal, and any police officer in the city may enter and arrest him. And so under the provisions of the 11th section, if a member of the Carson League chooses to intoxicate himself and his guests at his own house, he and they are innocent. But the moment the first guest puts his foot over the threshold into a traveled road, he is a criminal, and owes ten days to the penitentiary. A farmer returning from market who has taken a glass of brandy may be arrested on the highway. The moment he enters his own house, though he may be drunk, he is innocent.

On the 3rd of July, as the midnight bell tolled, Landon had \$6,000 worth of liquor on his premises. Five minutes before it was property. Five minutes after it was a nuisance. Five minutes before it was protected by law. Five minutes after it was free plunder for thieves. If it had so chanced that he had been the owner of a private dwelling, the wine in his cellar, though intended for use, would have been safe. He was free to drink and invite all men to drink with him. He could make drunkards, paupers and criminals, at pleasure, under the sanction of this law. He could invite his friends to drink

domestic brandy or Albany ale, and no man could molest or make him afraid. All this would have been innocent. All this the law sanctions. Is it true, then, that a public necessity has arisen, to make it unlawful and criminal to sell what is lawful and innocent to use? If wine is poison, why does the law permit the father to minister it in his own dwelling to his wife and children? If wine is poison, why hunt it out of boarding houses and warehouses, and give it a sanctuary among women and children at the private hearthstone? Why introduce temptation among those feeblest to resist? Why hedge round the traffic and sanction the use? If all intoxicating liquor is so deadly that it is criminal to sell, why sanction the sale of such liquor?

The pretext upon which the act is framed is falsified by its own provisions. It makes it innocent to use that which it makes criminal to sell for use. It professes to hold the traffic in all intoxicating liquor, a traffic in crime and death. In respect to two great classes of such liquor, it sanctions that traffic as lawful and innocent. That which it pronounces property when kept avowedly for use in a private dwelling, it pronounces no property when kept on store in a public warehouse. And on the pretext that though the use is innocent the sale is criminal, it proposes the confiscation of fifty millions of property in the hands of private citizens. Heretofore the law has been content to sanction the use and regulate the traffic; now it proposes at once to sanction the use and prohibit the traffic. It singles out for confiscation the property of a particular class of citizens. It discriminates between the owners of different kinds of intoxicating liquors; and destroys the property of one class, while it protects that of others equally within the principles of the law. While it recognizes liquors as property, it visits the owner with condign punishment for exercising over it the right of dominion, by offering it for sale for a confessedly lawful use.

The lawgivers on the fourth of July, when this act first speaks with the authority of law, find Mr. Landon at his hotel in possession of \$30,000 worth of property invested in the business by which he has gained his livelihood. They

address him in this wise: "You keep intoxicating liquor. We admit it to be property, and your property. You are secured in its enjoyment as well by the State as by the Federal Constitution. The government cannot deprive you of it, even in virtue of the right of eminent domain, without making just compensation. Under the constitution you have the right of absolute and unqualified dominion, so long as you apply it to no unlawful purpose. It is your property, and as such you have, according to the exploded theory of the courts, the right to keep it, to use it, to dispose of it as you may seem good. You may apply it to the payment of your debts. You may convert it into cash. You may sell it or bequeath it to your children. All this is included in the constitutional right of property. We respect your rights. We do not mean to invade them, except so far as we are constrained by our philanthropy. To the use of intoxicating liquor as a beverage, we give our legislative sanction. But we concur with the Carson Lague in the opinion that if you exercise your constitutional right to sell your property to be applied to a lawful use, you ought to be deemed a criminal. You must not sell. You own a hotel. That is entirely lawful. You are in possession as owner of intoxicating liquor. That is also entirely lawful. We propose to adopt a new rule of evidence, which is, that from the concurrence of these two lawful facts, we will presume your intent to commit crime. By the first section of our act we prohibit you from keeping your property in a hotel with an unlawful intent, and from the fact that you keep it there, we presume your intent to be criminal, and punish you with a penalty of fifty dollars, or the penitentiary at your election, and the confiscation of all your property. If you had owned a private dwelling your liquor would have been safe. You should have bought one. If you could not, you ought not to have been so poor. From him that hath not, shall be taken even that which he hath. If you had owned a private dwelling you would have escaped confiscation. This law which we ordain destroys your property, it is true, for the purpose of sale, but protects it for the purpose of use. You might in your own dwelling have drank and invited others

to drink. Bankrupt in all else, we would have left you rich in the means of self-destruction. Though we took you from your business, we would have left you your brandy. You and your friends might enjoy your property, so long as you confined yourself to the use of liquor as a beverage, which in the judgment of this legislature is innocent and commendable, though its sale for use is productive only of "intemperance, pauperism and crime." "

In considering the question of the constitutionality of this law, you have the aid of the arguments and conclusions of the leading members of the American bar, some of whom as jurists and civilians have left their impress upon our laws and made their names a part of our constitutional history. Our adversaries rely on the opinions of Judges Savage, Conkling and Edmonds, gentlemen of much learning and experience, and great private worth, but neither of whom ever occupied a position in the front rank of constitutional lawyers, neither of whom was ever eminently versed in public affairs, and but one of whom was ever regarded as rising above mediocrity among jurists. Chief Justice Savage has for about twenty years been withdrawn from professional pursuits, and in the opinion prepared by him declines the discussion of the constitutional question. Judge Conkling, the able predecessor of Judge Hall on the bench of the District Court, having recently returned from a mission to Mexico, prepared a hasty opinion, in which he frankly avows his inability to examine the constitutional authorities, and states facts which satisfactorily explain his failure to do justice either to himself or to the occasion; as will be seen by the following extracts from the commencement and conclusion of the opinion: "But circumstances, with a detail of which it is unnecessary to trouble you, prevent me from attempting more than to state very summarily the impressions I entertain on the subject after a careful perusal of Mr. Hill's elaborate and able document, but without any examination of the numerous authorities he has seen fit to cite."

Towards the conclusion he adds: "I have abstained, as at the outset I stated it to be my intention to do, from con-

sulting the authorities cited by him. Some of them, especially the reports of decisions in cases arising under similar laws of other States, I do not possess, and those I have, I have not had time, if I had the inclination, to examine. It will be seen also that I have omitted almost entirely any attempt to fortify my conclusions by reference to other authorities. Should you see fit to print what I have written, the public will, of course, estimate the value of my opinion accordingly." In the propriety of this caution, the public has very generally acquiesced.

The opinion of Judge Edmonds is characteristic of its author. It is rather plausible than sound, and though marked by much ability, is not calculated to increase our regret at his conclusion, with the entire concurrence of his constituents, that the recent change in the direction of his intellectual pursuits had not increased his fitness for a high judicial position. If there be one point in respect to this law in regard to which all men are agreed, its friends no less than its opponents, it is that it is the most involved and clumsy specimen of legislation which ever found its way into the statute book, and that whether constitutional or otherwise, it is characterized by palpable injustice and utter recklessness of private rights. But in a "vision" of the learned Judge, either by day or by night, the law changed its countenance, and clothing itself in beauty, inspired him with admiration which he could not suppress. "I observe," he says, "that the statute under my consideration has been drawn with great care and skill." "I observe also," he adds, "a spirit of caution and fairness pervading its enactments; for almost every conceivable precaution has been adopted to guard against the laws being used for purposes of oppression."

The array of professional and judicial opinion against the constitutionality of the act, is well calculated to arrest the public attention, and induce reflection even by the most earnest and sincere of the friends of coercion. Following the order of time, I need only mention a few of the most prominent and familiar names: Nicholas Hill, Jr., James

W. Girard, Daniel D. Barnard, Chief Justice Beardsley, Daniel Lord, George Wood, the father of the American bar, and Chief Justice Bronson, whose judicial character and services have made his name familiar through every State in the Confederacy. The conclusions of these gentlemen are the result of calm and deliberate investigation, and most of them have examined the question with all the aid that could be derived from the opinions of Judges Savage, Conkling and Edmonds.

If I paused here, resting upon these high authorities, might I not claim that this act should be held void until some Court should give it the sanction of a judicial endorsement. But I may not pause here. It is due to the cause and the occasion, that the law should be subjected to a rigid analysis, and tested by a comparison with the provisions of the Constitution. For this purpose I shall avail myself of the points prepared by my associate, Mr. Hill, during the progress of this trial, for the purpose of exhibiting the defiant conflict between the law and the Constitution. He has cited an array of authorities in support of each proposition, but I shall not trouble you with the citations except in two or three instances, for in my judgment the propositions argue themselves, and do not need to be fortified by authority, or illustrated by discussion.

The first principal proposition is, that an act passed in violation of the Constitution, or which is contrary to the nature and fundamental principles of a republican and free government, is no law and should be so held by all courts and juries.

The legislature, under our form of government, possesses no powers except such as have been conferred on it by the people. When it transcends this limit, its acts are utterly void, and no one can inflict or be subjected to punishment for disobeying them.

For the purpose of showing how entirely these views of Mr. Hill are in consonance with those eminent Judges, with whom he had no opportunity of consultation, and which have been published since these points were prepared, permit me

to read from the Herald report, some of the opinions expressed from the Bench on the recent argument in the second district:

Judge Brown. There are certain elementary principles which should be discussed in connection with this bill. The idea of property implies exclusive sovereignty and control over it. If you say that a man shall not use his property, what value can it have to him? Now, my property, the property which I or you, or any other person has—its value consists in our ability to sell it, to enjoy it, to deal in it. But if the Legislature have power to say that we shall not sell it, that we shall not deposit it in this place or in that place, does it not lose the essential properties of value, and is not that a destruction of the rights of property. It is with that question you have to deal.

Judge Strong. The Constitution of the United States guarantees a form of government to each State, and that guaranty itself prevents each State from transcending what may properly be called part of the republican institutions. The State legislatures cannot pass despotic laws.

Judge Brown. But you see that in this case the whole proceedings are assailed on the ground that the legislature had no power to pass such a law; and if they had not, then the proceedings in the court have no efficacy whatever. It strikes at the very root of the whole proceedings, because the legislature is limited in its power; and if they choose to transcend that power, it is just as if any other persons took upon them to enact laws.

Judge Strong. I believe there is a great difference between the regulation of a thing and the absolute prohibition of it. The power of the legislature, I believe, extends to regulating this matter; but when they attempt the total suppression of the sale of any article which is used for beverage or food, they outstrip their powers.

Let us compare the views of these learned Judges, with those of the Supreme Court of the United States. I read from 2 Dallas 308:

“What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution; they owe their existence to the constitution; they derive their powers from the constitution. It is their commission; and, therefore, all their acts must be conformable to it or else they

will be void. The constitution is the work of the will of the people themselves, in their original, sovereign, and unlimited capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercises of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve. Whatever may be the cases in other countries, yet in this there can be no doubt, that every act of the legislature, repugnant to the constitution, is absolutely void."

I read from now from 3 Dallas 388:

"The people of the United States erected their Constitution or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purpose for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican government, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal or State legislature cannot do without exceeding their authority. There are certain vital principles in our free Republican government, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive laws; or take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."

Our second principal position is, that spirituous or intoxicating liquor is within the protection of those clauses in our State and National Constitutions, which have for their object the security of proprietary rights and interests. "Spirits and distilled liquor are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic," etc. (5 How. 577, Taney, C. J.) They are admitted to be property by the act itself, which treats them as legitimate subjects of ownership, use and sale. (1 Curt. 328.)

Let me again call your attention to the elementary princi-

ples announced from the bench by the Judges of the Federal courts. I refer to 2 Dallas 310:

"The right of acquiring and possessing property and having it protected, is one of the natural, inherent and inalienable rights of man. Men have a sense of property. Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of the community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property is then a primary object of the social compact, and by the late Constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be lying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the Parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation and shock mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the Constitution. In short, it is what everyone would think unreasonable and unjust in his own case."

"The constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and no farther. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the constitution eventually destroyed. Where is the security, where the inviolability of property, if the legislature by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another? The rights of private property are regulated, protected and governed by general, known and established laws; and decided upon, by general, known and established tribunals; laws and tribunals not made and created on an instant of exigency, on an urgent emergency, to serve a present turn of the interest of a moment. Their operation and influence are equal and universal; they press alike on all. Hence, security and safety, tranquility and peace. One man is not afraid of another, and no man afraid of the legislature. It is infinitely wiser and safer

to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous and enormous a power as that which has been exercised on the present occasion; a power that, according to the full extent of the argument, is boundless and omnipotent. For, the legislature judged of the necessity of the case and also of the nature and value of the equivalent. Such a case of necessity, and judging too of the compensation, can never occur in any nation."

"Shame to American legislation. That in England, a limited monarchy, where there is no written constitution, where the Parliament is omnipotent and can mould the constitution at pleasure, a more sacred regard should have been paid to property than in America, surrounded as we are with a blaze of political illumination; where the legislatures are limited, where we have republican governments, and written constitutions, by which the protection and enjoyment of property are rendered inviolable."

"Alas! How necessity begets necessity. They rise upon each other and become endless. The proprietor stands afar off, a solitary and unprotected member of the community, and is stripped of his property without his consent, without a hearing, without notice, and the value of that property judged upon without his participation, or the intervention of a jury, and the equivalent therefore in lands ascertained in the same way. If this be the legislation of a republican government, in which the preservation of property is made sacred by the constitution, I ask, wherein it differs from the mandate of an Asiatic prince? Omnipotence in legislation is despotism. According to this doctrine we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the legislature. Wretched situation! Precarious tenure! And yet we boast of property and its security; of laws, of courts, of constitutions, and call ourselves free! In short, gentlemen, the confirming act is void; it never had constitutional existence; it is a dead letter, and of no more virtue or avail than if it had never been made."

Our third proposition is that the prohibitory act purports on its face to apply to property acquired before the 4th of July, 1855, as well as after, and aims to effect, through the operation of its provisions, the following results, among others: 1. To make that which was lawful property on the 3rd of July a public nuisance, and a subject of confiscation on the 4th, though it has undergone no actual change in the meantime. (§§ 1, 4, 23, 25, 6.) 2. To render the property utterly valueless on the 4th, and the owner or possessor a criminal, merely because he has let it alone. (§§ 1, 4, 23, 25, 6.) 3. To make it the duty of the owner to destroy it, and by withdrawing from it the protection of the public force, authorize others to seek

and destroy it. (§§ 1, 25, 23.) 4. To make the title held on the 3rd depend on the condition that the owner before the 4th will get another building in which to keep the property. (§§ 1, 4, 23, 25.) 5. To deprive the owner of all effectual remedy for the property, if taken, detained or injured before he is able to remove it to another place. (§§ 1, 16, 17.) 6. To prevent him from proving that his property is not a public nuisance in fact, and bind him by a legislative judgment on that question. (§§ 1, 25, 23.) 7. To make the possession of what it is lawful to buy and use, a criminal offense, though it is so kept as not to injure or annoy any one. (§§ 1, 23, 25.) 8. To do all those things without the concurrence of the judiciary, by a mere exercise of despotic will, and under the pretext of "State necessity." 9. To clothe inferior officers with unusual and dangerous power over personal liberty, and enable them to deprive men of property to an unlimited amount, without due process of law. (Const. Art. 1, § 6.) 10. To destroy "the right of trial by jury," as heretofore used in like cases, and deprive the owner of the right to elect, as formerly, between a jury of six and twelve. (Const. Art. 1, § 2.) 11. To alter the jurisdiction of inferior courts, and create new local courts in places other than cities, with power over property to an unlimited amount. 12. To authorize the arrest and imprisonment of a citizen on a complaint stating mere rumor or hearsay, without even charging enough to show an offense. (§§ 6, 7, 11.) 13. To authorize process of search and seizure, and a final judgment confiscating the property, on a like complaint, thus making it evidence on the merits. (§§ 6, 7, 10, 13.) 14. To authorize the forfeiture of property not described in the process, and as to which no accusation is made, no issue joined, nor any trial had. (§§ 1, 4, 5.) 15. To deprive the accused of the unrestricted right of defense, and make such right dependent on the condition that he will furnish evidence against himself. (§§ 7, 17, Const. Art. 1, § 6.) 16. To change the rules of evidence so as to affect the rights of liberty and property, destroy the presumption of innocence, and create an artificial presumption of guilt. (§ 1, 16, 17, 25.) 17. To make the mere fact of finding liquor in a place

not excepted by the first section, *prima facie* evidence that the owner of the place is criminal. (§§ 1, 16, 17, 23, 25.) 18. To authorize a second trial of the accused after he has been once acquitted by a verdict, thus exposing him to be twice put in jeopardy. (§ 8, Const. Art. 1, § 6.) 19. To authorize an entire system of search, seizure and destruction of property, in violation of the Constitution, and of the nature and principles of free government. 20. To interfere with the power to regulate commerce among the States, and also the power over "commerce with foreign nations," if the act applies to imported liquors. The principles on which this bill was framed were judicially condemned before Maine Laws were dreamed of. Indulge me in recurring again to one or two authorities, which upon these points are multiplied under the various subdivisions, to show how utterly subversive is this entire scheme of constitutional guaranties. I am embarrassed in the selection.

Let us read from 4 Hill 144:

"Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, it acts, like those of the most humble magistrate in the State, who transcends his jurisdiction, are utterly void."

"Mr. Justice Story says: 'The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people.'"

"The security of life, liberty and property lies at the foundation of the social compact; and to say that this grant of 'legislative power' includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the greatest ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power."

"No member of the State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless

by the law of the land or the judgment of his peers.' (Const. Art. 7, Sec. 1.) The words 'by the law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses, 'You shall be vested with the "legislative power" of the State;' but no one 'shall be disfranchised, or deprived of any of the rights and privileges' of a citizen unless you pass a statute for that purpose,' in other words, 'You shall not do the wrong unless you choose to do it.'"

"The section was taken with some modifications from a part of the 29th chapter of Magna Charta, which provided that no freeman should be taken or imprisoned, or be disseised of his freehold, etc., but by a lawful judgment of his peers, or by the law of the land."

"Lord Coke, in his commentary upon the statute, says that these words 'by the law of the land' mean 'by due course and process of law,' which he afterwards explains to be, 'by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law.' The meaning of the section then seems to be that no member of the State shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of common law."

We say in the fourth place, that one of the specific objections to the act, therefore, is, that it violates the proprietary rights of the citizen, by impairing the "obligation of contracts," contrary to an express inhibition of the Constitution of the United States. (Const. U. S., § 10, subd. 1.) 1. This provision is violated by an act affecting the tenure or the title to property acquired under a contract, whether the property be real or personal. 2. So if the act interferes with the right to use and enjoy the property in any manner which was lawful at the time of acquiring the title. 3. And so, *a fortiori*, if, as here, the act interferes with the enjoyment so as to render even the possession unlawful and criminal. 4. So if the act purports to render the right of enjoyment conditional, or more burdensome and expensive than before. 5. So if it changes the law protecting the property so as to expose it to depredation, and thus impairs its value. 6. Or if it alters the rules of evidence, or creates artificial presumptions affecting the security of property, in order to invite or to facilitate depredations upon it. 7. And so if the remedy for depredations is clogged by new conditions, or otherwise embarrassed,

so as to depreciate the value or impair the right. 8. In short, the Constitution is violated by any legislative assault upon vested rights of property, whatever may be its form or pretext. (Story's Const., § 1380.)

Permit me to cite a passage from Chief Justice Marshall:

"We cannot resist the conclusion that it would be a violation of the general tenure and spirit of the Constitution, for the legislature to attempt to deprive any citizen of his property, without previously providing compensation therefor. And whenever such acts are passed, we believe it to be the duty of the judiciary to disregard them and consider them as nullities. We cannot perceive any reason which shall compel the judiciary to obey a legislative act, at war with the tenor of the Constitution, and the fundamental principles for the preservation of which the Government was instituted, that would not apply with equal force to produce obedience to a legislative act, directly opposed to any one of the positive inhibitions of the Constitution. We grant that the representatives of the people are the shepherds to preserve the flock; but they are not exclusively such, although vested with great and extensive powers. If through inadvertence or design they should endeavor to sacrifice any one or more as victims, it cannot be done, so long as the judiciary remain virtuous, intelligent and independent. Both departments must concur to work iniquity before the people can be made to mourn, and in bitterness to curse their government."

Let me read from 6 Cranch 137, the language of Chief Justice Marshall:

"Whatever respect might have been felt for the State Sovereignities, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, manifested a determination to shield themselves and their property from the effects of the sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

Our fifth proposition is that this act is an exercise of judicial magistracy in respect to crimes, and violates those clauses in the Constitution of the United States which prohibit bills of attainder and *ex post facto* laws. (Const. U. S., §§ 1 and 10.) 1. These inhibitions were intended as restraints upon what is called the police power of government, and to secure against the despotism practiced under it. 2. They are vio-

lated by any act which destroys or impairs vested rights of property, without trial, by way of criminal punishment. 3. So of an act which adjudges that the property is in fact a nuisance, and precludes all right to a trial of that question. 4. So if it changes the rules of evidence so as to affect rights previously vested, by way of securing or facilitating penal forfeitures. 5. So of an act which usurps powers of judicial magistracy to any extent, over liberty or property, under pretext of punishing crimes.

This act has every characteristic of a bill of attainder. Let me refer to 1 Dana 510, a case in which the law under discussion, less revolting than our own, awarded compensation on divesting the right of property, but assumed to judge the measure of the compensation:

"Bills of attainder have generally designated their victims by name; but they may do it, also, by classes, or by general description, fitting a multitude of persons. Either mode is equally liable to moral or constitutional censure. They have generally been applied to the punishment of offenses already committed; but they have been, and may be, applied to the punishment of those thereafter incurring. A bill of attainder is not necessarily an *ex post facto* law. A British act of Parliament might declare, that if certain individuals failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts could enforce it without indictment or trial by jury; the prisoner, when brought to the bar, being merely asked what he has to allege why execution should not be awarded against him. It is unnecessary to say whether either of the several clauses of the Constitution referred to would singly be sufficient to invalidate the act; and I do not wish, therefore, to be understood as saying that either of them would. But that some, or all of them together, do invalidate it, I feel no doubt. They all tend to show that the legislature cannot in this mode, by any mere act of its own, divest a citizen of his property. They constitute together, in letter, spirit and general scope of policy, a mass of obstacles to the divestiture of Gaines' title, in the manner contemplated, which to my mind is perfectly insurmountable, and which compels me to concur in saying the title is still in him, and that the act of 1824, is no obstacle to his recovery."

"The verdict and judgment formed no condemnation upon which to base it, and from which it could follow as an incident. They were themselves but the result of a forfeiture therefore incurred, and of a divestiture of title, which had therefore taken place. The Court and jury were a means for carrying into effect what the legislature had commanded, but acted upon what it supposed the legislature of itself had already done."

Our sixth proposition is that the act not only conflicts with the above provisions in the Constitution of the United States, but violates most of the guaranties of liberty and property contained in the Constitution of this State. 1. It violates the provision which secures "the trial by jury in all cases in which it has been heretofore used," which means a jury of twelve men. (Const. of N. Y., Art. 1, § 2.) 2. Also the provision that "no person shall be deprived of life, liberty or property, without due process of law." (Const., Art. 1, § 6.) 3. It violates the provision that "no person shall be twice put in jeopardy," etc., by giving power to annul the effect of an acquittal. (Const., Art 1, § 6.) 4. So as to the provisions demanding "excessive bail," imposing "excessive fines," and inflicting "unusual punishments," etc. (Const., Art. 1, § 5.) 5. And the implied inhibition against changing the jurisdiction of courts, so as in effect to establish new inferior courts, not proceeding according to the course of the common law. (Const. of 1821, Art. 7, § 2; Const. of 1846, Art. 6, §§ 5, 14.)

The seventh principal proposition is that the act purports on its face, to be an exercise of powers, inconsistent with the nature of republican and free governments, and which are therefore not within the general grant of legislative power contained in the Constitution. (Const., Art. 3, § 1.) 1. The powers thus usurped are mainly those which have been uniformly deemed tyrannical, and characteristic of a despotism. 2. As such powers cannot be presumed to have been granted by the people, they are anti-republican in their origin as well as principles. 3. Some of these powers, moreover, are judicial in their character, and not embraced by the terms, "Legislative authority." (Const. of N. Y., Art. 3, § 1.) 4. An act imparting an exercise of powers not granted by the Constitution, is equally void with one which violates some express restriction. 5. So as to an act which violates the "spirit, nature and genius" of a government, as evinced by the express guaranties in its Constitution.

Our last proposition is that the act evinces a studied effort to violate the fundamental guaranties of civil liberty, subvert the Constitution, and usurp despotic power by a series of trans-

parent evasions. The entire scheme of measures proposed by it is vicious, and no part of it can be upheld.

This general summary of a few of the more obvious objections to the law will enable you to compare it with the guaranties of the Constitution. I have given you a few extracts from the authorities which illustrate their spirit, and have read them to little purpose, if you can fail to see that this law is utterly at war with the bill of rights, and the fundamental principles of a free government.

You are told that you alone are to close your eyes upon the Constitution; that you have nothing to do but to obey the mandate of the legislature; that the law of the creature is higher than the law of the Creator; that you owe to your servants an allegiance, which they do not acknowledge to their masters; and that you are to defend the statutes by being disloyal to the Constitution.

You see by the authorities I have read, what verdict would be pronounced by a jury composed of men like Marshall and Story, and Chase, and Patterson and Beardsley and Bronson. They express their convictions. You are to express yours. They owed to the Constitution no higher fealty than you. They had no more interest than you in the defense of popular rights.

If this law is valid, the same power which could punish two thousand Albanians with confiscation, could punish them with death. If it can make an innocent act criminal, it can make it capital. If it can deprive the accused in the one case of the judgment of his peers, so it can in the other. The same power which the legislature has given to these justices over men's fortunes and liberty can be extended to their lives. The same guaranties of the Constitution protect property, liberty and life. If this legislature had dared to carry out their plan of reform, in the spirit of the inquisitors from whom it was borrowed, and it was Landon's life, instead of his property and liberty which was now trembling in the scale, I could cite no passage from the Constitution which I have not cited today; nor find a safeguard for his life, which is not equally a safeguard for his property. If you can now hold, you could

hold then, that the legislature can delegate to you a power which was never delegated to them.

It may be that under a law utterly void upon its face, you will hold that you can condemn Landon as a criminal. It may be, that these penalties and confiscations can be enforced. If it were announced that on the 4th of July, 1855, a fire occurred in the city of Albany, by which fifty millions of property were destroyed by the Providence of God, it would send a shock through all Christendom.

But if it were related that the property was collected for destruction by Delavan's troop of philanthropists, and that the Legislature of New York had commissioned you to fire the pile, all men would have revolted with horror, and felt that the time had indeed come for this people to "curse their government." There is the law, and there is the Constitution with its heel upon it. The Carson League call upon you to come to the rescue of the law, and strike down the Constitution.

If these men believe what they say, if they hold that the public good demands that these millions shall be seized by government from its citizens, let them at least make compensation, from a decent respect for the Constitution. John McKnight has \$100,000 in property, acquired under the faith of existing laws. Edward C. Delavan has \$100,000 invested in stocks under faith of the same laws. To effect a moral reformation, Delavan contributes nothing, but exacts from McKnight the contribution of his whole fortune. And this is philanthropy. It is the morality of the Carson League. It is not the morality of the Constitution.

It is a mistaken philanthropy which shows its respect for law by breaking down the Constitution, and commences its work of reform by legal spoliation and robbery. This law cannot and will not stand. It was passed in the heat of fanatical excitement, with the co-operation of time-serving political aspirants.

In the leading commercial State of the Union no law can stand, no party can stand, which begins its course by confis-

cating millions of property, by cleaving down the rights of a hundred thousand citizens, and by inflicting the most disastrous blow which has ever fallen on the business interests, not only of our political capital and seaboard metropolis, but of the whole agricultural, navigation and commercial interests of the State.

You occupy a position, gentlemen, of no ordinary responsibility. This is the leading case in the State of New York, under this strange bill of penalties and confiscation. It has excited an interest commensurate with its importance. Tens of thousands within the State, tens of thousands beyond it, are waiting for your decision with the most intense solicitude.

You are placed in the van of this great battle between the invaders and defenders of the State and Federal Constitution. Your verdict will be a precedent for other courts and other juries. If you stand firm by the Constitution they will stand firm. If you falter they may falter. The issue and the parties are before you. On one side is the Carson League, holding up, and commending to your care this confiscation bill, shapeless, impotent, "dead-born from the womb." On the other is a citizen falsely arraigned as a criminal, under a law he has never violated, and holding up the Constitution as his shield and defense.

I trust your verdict will be a prompt and cordial response to the public sentiment of the citizens of Albany, and that you will leave this law in the hands of its pallbearers, to be borne on to the grave. Here at least your verdict will end these State prosecutions.

And not here alone will it be hailed with joy and acclamation, but as the tidings run on the electric wires from city to city, and from State to State, the friends of constitutional rights, and the lovers of civil liberty, will unite in doing honor to the independence and integrity with which you vindicated the rights of the defendant, and your own rights as American jurors.

Mr. Werner addressed the jury, repeating his arguments made to the Judge, *ante*, p. 899.

THE VERDICT.

The *Jury* retired and after a short absence returned a verdict of *Not Guilty*. The *Defendant* was thereupon discharged.

Several other prosecutions under this act took place in other places in the State where the defendants were convicted by the jury. Two of them appealed to the Court of Appeals, where in March, 1856, the Prohibition act was declared to be unconstitutional. *Wynehamer v. People*, N. Y. 2 Park. Crim. Rep. 421; *People v. Toynbee*, 2 Park Crim. Rep. 490.

ADDENDA

Robbins, Jonathan. Ante, p. 812.

MOULTRIE, ALEXANDER. Born Charleston, S. C., 1750; half brother of Gen. William Moultrie, hero of Ft. Moultrie and Governor of South Carolina; member Middle Temple, London, 1768; admitted to South Carolina Bar, 1772. Served in Continental Army. Elected Attorney General South Carolina, 1776; member South Carolina House of Representatives, 1778-1781. See McRady, "South Carolina under the Royal Govt." O'Neill, Bench and Bar of S. C. 2-598.

KER, SAMUEL. First lawyer to practice in Newberry, S. C., 1804. O'Neill (Annals of Newberry, 1859, p. 106) says: "He had a fine practice, but was not, I think, a very well educated lawyer."

WARD, HENRY DANA. (1768-1817.) Born Shrewsbury, Mass. A. M. Harvard, 1791. Practiced for many years in Orangeburg, S. C. Died while on a visit to Middletown, Conn.

Duane, William. Ante, p. 678.

BECKLEY, JOHN JAMES. (1757-1807.) Born in Virginia; student at William and Mary Coll., 1776-1781, where he was one of the original members of the Phi Beta Kappa Society; clerk State Senate, 1779; clerk House of Delegates for many years after 1781. Clerk Convention of 1788; clerk U. S. House of Representatives, 1789-1799, 1801-1807; admitted to Philadelphia Bar, 1791; first Librarian of Congress, 1802-1807. See Phila. Directory, 1797. Martin Bench and Bar of Phila.; William and Mary Quarterly Hist. Mag. 4-226, 250; (Original Records of the Phi Beta Kappa Soc.) Hist. Coll. William and Mary, 1660-1874; Grigsby Hist. of Va. Fed. Conv. of 1788 in Va. Hist. Soc. N. S. 9 (1890), p. 64 Johnston (W. D.) Hist. Library of Congress.

DUNKIN, ROBERT HENRY. Admitted to Philadelphia Bar, 1791; clerk of the Corporation, 1794. Died, 1809. See Martin Bench and Bar of Phila.; Davis, Some Account of the City of Philadelphia, 1794.

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